16

FILED
JUN 30 1953
HAROLD B. WILLEY, Clerk

IN THE

Supreme Court of the United States

OCTOBER TERM, 1953

No. 158

JOE W. LOWDERMILK, Receiver of Sullivan Petroleum Corporation,

Petitioner,

v.

THE OHIO OIL CO., A Corp.,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

JOHN W. BECKER,
CLARENCE R. MARTIN.
Counsel for Petitioners.

INDEX

	Page
JURISDICTION	2
OPINIONS BELOW	2
QUESTIONS PRESENTED	3
STATEMENT OF REASONS FOR WRIT	4
SPECIFICATION OF ERRORS TO BE URGED	6
THE FACTS	10
Hayden Assignment	14
Poe Assignment	17
Answer	20
State Court Proceedings	20
Motion for Summary Judgment	27
Judgment	28
CONCLUSION	29

CASES CITED

Page

Allen v. Phillips Pet. Corp., 13 Fed. 2d 584, CA 8th..... 33

Casden v. Cline, 26 Fed. 2d 631, CA 8th 33

Consumers Gas & Trust Co. v. Littler, 162 Ind. 320.... 6

Federal Oil Co. v. Western Oil Co., 112 Fed. 373..... 6
Affd. 7th C. Ct. 121 Fed. 674, 5, 6 34

Gadbury, et al. v. Ohio & Ind. etc. Gas Co., 162 Ind. 9.... 6

Guffey v. Smith, 237 U. S. 101, 59 L. Ed. 856, 863..... 6, 7

Ohio Oil Co., et al. v. Detamore, 165 Ind. 243 6

Palmer v. Chamberlin, CA 5, 1951, 191 F. 2d 532..... 7

Phoenix v. Mid-Continental Pet. Corp., 117 Okla. 530, Anno. 111 A. L. R. 510 34

Smith v. Louisiana O. R. Co., 12 Fed. 2d 378, CA 8th.... 33

Watchorn v. Roxana Pet. Corp., 5 Fed. 2d 363, CA 2d.... 33

Wisser v. Mursan Shoe Corp., CA 2d, 1942, 127 F. 2d 344, 145 A. L. R. 467 9

STATUTES CITED

	Page
Sec. 56, 56 (c), 56 (d) Federal Rules of Civil Procedure	1
Sec. 1254 (1) U. S. C.	2
C 139 Sec. 103, Stat. 104—May 24, 1949	4
C 343 Sec. 2, 63 Stat. 446—July 18, 1949	4
C 174 Sec. 2, 64 Stat. 158—May 10, 1950	4

IN THE

Supreme Court of the United States

OCTOBER TERM, 1953

No.

JOE W. LOWDERMILK, Receiver of Sullivan Petroleum Corporation,

Petitioner,

v.

THE OHIO OIL CO., A Corp.,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

To the Honorable the Chief Justice and the Associate Justice of the Supreme Court of the United States

I. SUMMARY

Your petitioner represents and shows:

That errors have been made herein by the Court of Appeals, 7th Circuit, in the construction, interpretation and application of Rule 56 (c) and 56 (d) of the Federal Rules

of Civil Procedure, in contravention of the decisions of all United States Courts of Appeal heretofore made.

That petitioner, by such erroneous construction, interpretation and application of said rules has been denied the right of trial for the determination of genuine issues of material facts.

That the errors committed were made in deciding questions of federal law of substance not in accord with the Federal Rules of Civil Procedure adopted by the Supreme Court, and also contrary to and in violation of an Act of Congress and of the rights of petitioner as guaranteed by the Seventh Amendment to the Constitution of the United States.

That the decision of the Court of Appeals decided an important question of local law in a way that is in conflict with applicable local decisions. That the Court of Appeals and the District Court departed so far from the accepted and usual course of judicial proceedings as to call for the exercise of the power of supervision of the Supreme Court.

All of these errors will hereinafter be made to appear.

Your petitioner prays that a writ of certiorari be issued for a review and correction of the errors committed.

II. JURISDICTION

The Supreme Court has jurisdiction by virtue of Sec. 1254 (1) U. S. C.

The decision and judgment of the Court of Appeals sought to be reviewed was dated April 6, 1953, and is printed in the record beginning at page 148 and reported in 203 F 2d 399. This application for writ of certiorari is made this ___ day of June, 1953.

III. QUESTIONS PRESENTED

The questions presented are:

1. In reviewing this case on appeal from a summary judgment entered pursuant to Rule 56 (c) of the Federal Rules of Civil Procedure, and in deciding that there was no genuine issue of material fact and that the defendant was entitled to a judgment as a matter of law, did the Court of Appeals, 7th Circuit:

   (a) review all the facts presented by the record and *determine therefrom whether or not there was a genuine issue of material fact* in the case, — or did it, by weighing such facts and forming its conclusions with references thereto, proceed to *determine issues of material fact*?

   (b) consider the facts of record which sustain plaintiff's claim to relief in determining whether there was a genuine issue of material fact—or did it erroneously base its judgment on the facts most favorable to the defendant?

2. Did the Court of Appeals err in deciding that it had authority, in considering this matter of a summary judgment, to weigh facts and inferences of fact and arrive at a determination of the situation of the parties and of the conditions existing at the time of the making of the agreement?

3. Did the Court of Appeals err in deciding that it had authority to weigh the contents of the writings of the parties made to express several agreements and to determine issues of fact upon which it based its construction of the contract involved in the controversy?

4. Did the Court of Appeals decide an important question of local law in a way conflicting with applicable local decisions?

5. Did the Court of Appeals render a decision in conflict with decisions of other Courts of Appeal on the same matter?

6. Did the Court of Appeals depart from the accepted and usual course of judicial proceedings so as to call for the exercise of the power of supervision of the Supreme Court?

7. Does the decision and judgment of the Court of Appeals violate the Act of Congress pertaining to the rule making power of the Supreme Court as amended May 24, 1949, c. 139 Sec. 103 Stat. 104; July 18, 1949, c. 343, Sec. 2, 63 Stat. 446; May 10, 1950, c. 174, Sec. 2, 64 Stat. 158; providing that the rules of the Supreme Court shall preserve the right of trial by jury as at common law and as declared by the Seventh Amendment to the Constitution?

8. Does the decision and judgment of the Court of Appeals deprive the plaintiff-petitioner of a right secured by the seventh amendment to the Constitution of the United States?

IV. REASONS RELIED UPON FOR ALLOWANCE OF THE WRIT

(a) **Judgment and Decision.** The decision of the Court of Appeals is made up of three parts, a sort of decision in the alternative, so that if one reason be erroneous, then there is yet another reason why it holds the defendant was entitled to a judgment as a matter of law.

The matter for determination was whether or not a so-called assignment, Exhibit A, referred to as the Poe assignment of Sullivan Petroleum Corporation's oil lease on land belonging to Albert Poe, to The Ohio Oil Company transferred the right to produce and market the oil from the leased premises, or merely give the Ohio Oil Company a right of use of the leased premises for the purpose of prospecting for oil by the deepening of a designated well to a specified depth. (Opinion R., p. 152).

The Court of Appeals decided first that because of the plain, unambiguous phraseology of the instrument it was not open to construction or question but that The Ohio Oil Company became the owner of the Poe well and the oil produced therefrom, upon the deepening of the well. (Record, pages 153, 157). *Second:* that certain State court proceedings demonstrated a construction of the instrument by plaintiff's failure to include, in a certain action against the defendant, a claim for the Poe well or the oil therefrom; *Third:* that a rental contract (exhibit F Record, page 59) made the day before the Poe assignment, providing for the use of Sullivan Petroleum's drilling equipment in place over the Poe well by The Ohio Oil Company in event Ohio exercised its optional right to the use of the leased Poe premises for the deepening of the Poe well as stipulated in the Poe assignment and in an exhibit B, referred to as the Hayden assignment, as a condition to The Ohio Oil Company acquiring ownership of certain other oil leases referred to as the Hayden, Williams and Walters leases, (Exhibit B, Record, pages 41, 42) "is consistent only with an understanding that the rights covered by the Poe assignment were, upon performance, to be vested in Ohio" (Quotation from opinion record, top page 157) *Fourth:* and lastly the court decided that

the "situation of the parties and the conditions existing at the time of the conveyance" described and declared by the court to establish the assignor of being "in a state of desperation" at that time. (Opinion Record, page 159) and therefore "being at the end of its row" made a contract with its "chance of gain not great" but "perhaps commensurate with the unfortunate situation in which it was then engulfed".

The decision and judgment is printed in the record accompanying this petition beginning at page 148; and is reported in 203 Fed. 2d 399.

Petitioner filed a petition for rehearing with the Court of Appeals which is printed in the record herein beginning at page 161 on April 21, 1953 which petition was denied May 11, 1953, (Record, page 196).

(b). Errors Complained of.

(1) The court erred in deciding an important question of local law and in a way conflicting with applicable local decisions of the highest courts of Indiana, and with former decisions of the United States District Court of Indiana and of the Court of Appeals for the seventh circuit adopted and followed as precedent by the highest courts of Indiana, to-wit: *Gadbury et al. v. Ohio and Indiana Consolidated and Natural Gas Co.,* 162 Ind. 9; *Ohio Oil Co. et al. v. Detamore,* 165 Ind. 243; *Consumers Gas Trust Co. v. Littler,* 162 Ind. 320; *Federal Oil Co. v. Western Oil Co.,* 112 Fed. 373, affirmed by opinion 7th CCA, 121 Fed. 674, 675-6; establishing and declaring the local law to be that an instrument in writing purporting to grant for only a nominal consideration the exclusive right to mine for and produce and market oil or gas from land described to be in "legal effect the grant of a mere use for the purpose of pros-

pecting'' (Quotation from 7th CA 121 Fed. 674, page 676) and which local law has been declared by the Supreme Court to be a rule of property of the jurisdiction. *Guffey v. Smith,* 237 U. S. 101, 59 L.Ed. 856, 863.

(2) The court erred in determining genuine issues of disputed material facts.

(3) The court erred in determining genuine issues of material fact from the writings as stated by the court in its decision and opinion, from a consideration of which writings impartial men of common understanding might reasonably believe differently and might reasonably believe that the "understanding" (agreement) was that The Ohio Oil Company agreed to deepen the Poe well at its expense to the specified depth, for the sole use and benefit of Sullivan Petroleum Corporation, in consideration of Sullivan assigning to Ohio certain other oil leases known as the Hayden, Williams and Walters leases subject to a reservation by Sullivan of a small fractional part of oil that might be produced therefrom, but without obligation of Ohio to Sullivan to ever drill for, or produce oil therefrom as stated in Exhibit B, the Hayden assignment (Record, pages 41, 42), and might be of the further belief that the Poe assignment was, and was intended to be, a grant of use only of the leased premises to enable Ohio to supply the consideration Ohio was to pay Sullivan for the Hayden, Williams and Walters leases, namely to deepen the Poe well to the depth specified by Exhibit B, the Hayden assignment.

Palmer v. Chamberlin, CA 5th, 191 F 2d 532.

(4) The court erred in determining genuine issues of material fact from its consideration of the record of other

court proceedings between the parties, from a consideration of which impartial men of common understanding might arrive at a different belief than the belief stated by the court, namely that the receiver chose not to litigate the matter here litigated because of lack of funds to engage in such expensive litigation, or that the receiver did not wish to litigate or was at the time unprepared to litigate the present dispute, or simply because it was an immaterial and irrelevant matter to the matter then being litigated, or they might be of the belief that there was no fact to be inferred therefrom that could be considered in a "construction" of Exhibits A, B, or F or either of them.

(5) The court erred in determining a genuine issue of material fact from Exhibit F (Record, page 59), that the so-called rental contract Exhibit F "is consistent only with an understanding that the rights covered by the Poe assignment were, upon performance, to be vested in Ohio" (Quotation from opinion, Record, page 157). Men of ordinary understanding might arrive at the belief from a consideration thereof that it evidenced no understanding whatever other than The Ohio Oil Company was given an option for the use of the drilling equipment during a certain period of time for a consideration stated without obligation on Ohio's part to ever use the equipment.

(6) The court erred in determining from the situation of the parties and the conditions existing at the time of the conveyance that "Sullivan was without money, or credit by which it could be obtained, to continue the drilling of the Poe well or to commence the drilling of other wells. It was almost at the end of its row, in a state of desperation. It stood no chance to lose but could only gain by its arrangement with Ohio. True, its chance to gain was not great but, even so, it was perhaps com-

mensurate with the unfortunate situation in which it was then engulfed," there being nothing in the record proper of consideration from which it was possible for the court to find such a fact or become of such a belief from the record on the motion for summary judgment. There is such argumentative averments in the answer, but the answer is not verified and is no part of the record on the motion for lack of such verification. (Quotation from the Courts decision Record, page 159 summarizing the unverified answer at Record, page 29, folio 69).

(7) The court erred as above and by so doing decided the case in such a manner as should cause the Supreme Court to exercise its supervisory power, the decision of the Court of Appeals so far departed from the accepted and usual course of judicial proceedings as to announce that there was no genuine issue of material fact, while at the same time its written decision is replete with the determination of genuine issues of material fact upon which it formulated and founded its decision and judgment.

Its action in determining these stated genuine issues of material fact are in conflict with the Federal Rules of Civil Procedure as made by this court and with the decisions of the different Courts of Appeal prohibiting the determination of a genuine issue of material fact by the court upon motion for summary judgment under Rule 56 (c); and such decision and judgment unlawfully deny a trial upon genuine issues of material fact in violation of the seventh amendment to the Constitution and the applicable acts of the Congress with respect to the rule making power of the Supreme Court.

Wisser v. Mursan Shoe Corp, CA 2d, 1942, 127 F 2d 344, 145 ALR 467;

3 Baron & Holtzoff, Fed. Practice & Proc. Sec. 1242 —Rule 56.

THE FACTS

The following is a summary of the facts, the complaint, oil lease assignments, affidavits, etc., as presented to the Court of Appeals by Plaintiff-Appellants brief filed therein.

This action was brought to recover the value of oil, the property of the Sullivan Petroleum Corporation, taken and sold by the defendant.

The Sullivan Petroleum Corporation was the owner of certain oil and gas leases. The Ohio Oil Company obtained possession of the leased premises by reason of two writings, called assignments of these leases. The controversy arises out of these writings and its determination is dependent upon their interpretation.

The defendant moved for summary judgment upon the theory that Plaintiff's claim was dependent upon the invalidity of these writings, and, that in a prior action between the parties the validity of these writings was adjudicated by finding and judgment, which finding and judgment estops the plaintiff from contesting that issue.

The Court sustained the motion of defendant and entered a summary judgment against the plaintiff.

THE COMPLAINT

The complaint was filed in the State Court and was not redrafted after the cause was removed by the defendant to the Federal Court. It was in one paragraph, designed to obtain a relief upon the facts stated, and as might be warranted upon proof made upon a trial. Plaintiff's cause of action was to recover of defendant the value of oil taken by it and sold, which oil is alleged to be the property of the Sullivan Petroleum Corporation, of which the plaintiff is Receiver. The complaint is set forth in full in the Record

beginning at page 6 thereof. The substance thereof is as follows:

The plaintiff, Joe W. Lowdermilk, is the Receiver of Sullivan Petroleum Corporation, an Indiana Corporation, by virtue of appointment made by the Sullivan Circuit Court, of Sullivan County, Indiana. (Record, page 6, Folio 9.)

The Sullivan Petroleum Corporation was incorporated and authorized to engage in the business of mining for and producing oil and gas, and to hold and own such property as might be used or useful therein. (Record, page 6, Folio 9.)

The Ohio Oil Company is an Ohio corporation engaged in doing business in Indiana as a foreign corporation.

The Sullivan Petroleum Corporation became the owner of oil and gas leases upon lands in Sullivan County, Indiana. Two of the leases so owned, and which have become known as the Albert Poe lease, and the Ural Hayden lease, are particularly described, together with a legal description of the lands covered thereby. (Record, page 7, Folio 10.)

That on April 1, 1942, the only property of value possessed by Sullivan Petroleum Corporation was the aforesaid Albert Poe and Ural Hayden oil and gas leases, together with certain oil well drilling equipment of nominal value, together with a partly drilled well upon the Albert Poe lease; that Sullivan never thereafter possessed any other or different property of value. (Record, page 7, Folio 10.)

That Sullivan Petroleum Corporation had, prior to April 1, 1942, commenced the drilling of a well for oil on the Albert Poe lease, and had on that date reached a depth of 1700 feet, more or less; all cost and expense of drilling had been paid, and there were no liens thereon. (Record, page 8, Folio 11.)

That on the first day of April, 1942, the Ohio Oil Company induced the President and Secretary of Sullivan Petroleum Corporation, by means unknown, but known to defendant, to transfer and assign to defendant the Albert Poe lease and the well thereon, without payment of anything therefor, and without promising anything therefor, and without giving or promising to give anything therefor, together with all other property of Sullivan Petroleum Corporation, excepting said drilling equipment. (Record, page 8, Folio 11.)

That on April 26, 1942, there was made and delivered a written assignment of the Albert Poe lease and Poe well to defendant, for which the defendant neither paid or promised anything, a copy of which assignment is made a part of the complaint and marked exhibit A. That on the 27th day of April, 1942, there was made and delivered a written assignment of the Ural Hayden lease to the defendant, for which the defendant neither paid or promised anything, but which recited that should a producing oil well be thereafter drilled on the leased premises, defendant would run to the credit of assignor a 1/32d part of the oil as an overriding royalty, but contained no promise to drill at any time. (Record, page 8, Folio 11.) That a copy of said assignment is marked exhibit B and made a part of the complaint.

That defendant has never at any time paid anything to anyone for the Albert Poe lease or Poe well, nor has it ever promised to do or pay anything therefor. (Record, page 9, Folio 12.)

That subsequent to the 27th day of April, 1942, defendant drilled a well upon the Ural Hayden lease, produced oil therefrom, paid the plaintiff a 1/32d part of the proceeds derived from a sale thereof. (Record, page 9, Folio 12.)

The defendant deepened the Poe well until it reached a depth of about 2300 feet where oil was found in large quantities; that defendant since said time has produced and sold oil produced by it from said Poe well of the value of and for which defendant has received the sum of $750,000.00, which oil was the property of the Sullivan Petroleum Corporation, but which the defendant reduced to its possession by means of the Poe well and sold as its own, and has and retains the proceeds from its sale thereof. (Record, page 9, Folio 12.)

A similar averment is made of the production and sale of oil from a well upon the Hayden lease. (Record, page 9, Folio 12.)

That the supply of oil to which the Poe and Hayden wells give access has been greatly diminished and the said lands greatly depleted of oil by the extraction of oil by the defendant therefrom, through the Poe and Hayden wells, to the great damage of the Sullivan Petroleum Corporation in the sum of one and one-half million dollars, that depletion will continue during the pendency of this action by the continued acts and doings of the defendant by its continued extraction of oil through said wells. (Record, page 10, Folio 12.)

That the defendant has and does claim to be the owner of the oil procured or procurable from the lands described in the Poe and Hayden leases. (Record, page 10, Folio 13.)

Then follows an averment in rhetorical paragraph 20 of the complaint that exhibits A and B were made and delivered without the consent or approval of the stockholders of Sullivan Petroleum Corporation and contrary to express statutory limitation upon the powers and authority of the President and Secretary to dispose of all of the property of the corporation without the consent of the stockholders. (Record, page 10, Folio 13.)

That the Albert Poe and Ural Hayden leases granted the exclusive right and no other of mining and producing oil or gas from the lands therein described. (Record, page 11, Folio 14.)

That the plaintiff is entitled to recover as damages, interest upon each monthly sale and conversion of said oil by defendant. (Record, page 11, Folio 14.)

The prayer is for judgment in the sum of one and one-half million dollars with interest from date of each respective taking of oil and sale thereof by defendant from the Poe and Hayden wells, and for such other and further relief in the premises to which the plaintiff may appear entitled. (Record, page 11, Folio 14.)

Exhibits B and A are printed in full from the Record, pages 41 to 43 and pages 12 and 14.

EXHIBIT B (Record, p. 41-43.)

ASSIGNMENT OF OIL AND GAS LEASE

Know all men by these presents, That the undersigned, Sullivan Petroleum Corporation, a corporation incorporated by and under the laws of the State of Indiana, hereinafter called Assignor, for and in consideration of the sum of One Dollar ($1.00), the receipt of which is hereby acknowledged, does hereby sell, assign, transfer and set over unto The Ohio Oil Company, an Ohio corporation, hereinafter call Assignee,

That certain oil and gas lease dated June 21, 1940, from Ural Hayden and Lura Hayden, his wife, as Lessor to V. F. Jones and George D. Gettinger, as Lessee, recorded in Miscellaneous Record 40 at Page 23 in the Records of Sullivan County, Indiana, insofar as said lease covers the following described land in Sullivan County, Indiana, to-wit:

The Southeast ¼ of the Southwest ¼ of Section 3, Town 8 North, Range 10 West, Turman Township, Sullivan County, Indiana, containing 40 acres, more or less,

together with the rights incident thereto and the personal property thereon, appurtenant thereto or used or obtained in connection therewith.

That certain oil and gas lease dated June 6, 1940, from Clarence M. Walters and Carrie Walters, his wife, as Lessor, to V. F. Jones and George D. Gettinger, as Lessee, recorded in Miscellaneous Record 40 at Page 41 in the Records of Sullivan County, Indiana, insofar as said lease covers the following described land in Sullivan County, Indiana, to-wit:

The South ½ of the Southeast ¼ of the Northeast ¼ of Section 3, Town 8 North, Range 10 West, Turman Township, Sullivan County, Indiana, and containing 20 acres, more or less,

together with the rights incident thereto and the personal property thereon, appurtenant thereto or used or obtained in connection therewith.

That certain oil and gas lease dated June 6, 1940, from Florence Williams and Luther Williams, her husband, as Lessor, to V. F. Jones and George D. Gettinger, as Lessee, recorded in Miscellaneous Record 40 at Page 43 in the Records of Sullivan County, Indiana, insofar as said lease covers the following described land in Sullivan County, Indiana, to-wit:

46 acres off of the South side of the East ½ of the Southwest ¼ of Section 34, Town 9 North, Range 10 West, Fairbanks Township, Sullivan County, Indiana, and containing 46 acres, more or less,

together with the rights incident thereto and the personal property thereon, appurtenant thereto or used or obtained in connection therewith.

As a further consideration for this assignment, Assignee obligates itself, its successors and assigns, to deliver to the credit of Assignor, their successors and assigns, free of cost in the pipe line to which it may connect its well, as an overriding royalty, the equal one thirty-second (1/32) part of all oil and gas, or either of them produced and saved from the property hereinabove described, and all conditions hereof shall extend to and be binding on the successors and assigns of the parties hereto.

Unless Assignee shall on or before the first day of June, 1942, commence or cause to be commenced operations for the deepening of a certain test well for oil and gas as now located in the Northeast corner of the Northeast ¼ of the Southwest ¼ of Section 3, Town 8 North, Range 10 West, Sullivan County, Indiana, and known as the Sullivan Petroleum Corporation's A. Poe No. 1, and prosecutes said operations with due diligence to a depth sufficient to test the oil and gas producing possibilities of that certain horizon at which that formation commonly known and referred to as the Niagara Limestone may reasonably be expected to occur, then this assignment and all rights hereunder shall terminate as to both parties and the oil and gas leasehold estate herein assigned shall revert to Assignor, their successors and assigns.

It is understood and agreed that if oil or gas is found in the test well hereinabove referred to in paying quantities at a lessor depth than that at which the Niagara Limestone may reasonably be expected to occur, then, in that event, the condition for deepening of the test well hereinabove set out shall be considered as fully met and complied with, and the oil and gas lease and leasehold estate hereby assigned shall be and remain the property of Assignee, its successors or assigns.

And for the same consideration, Assignor covenants with Assignee, its successors and assigns, that Assignor is the lawful owner of and has good title to the leases, or

portions of leases, estates, rights and property hereby assigned, free and clear from all liens, encumbrances or adverse claims; that said leases are valid and subsisting leases on the land above described; and that all rentals and royalties due thereunder have been paid and all conditions necessary to keep the same in full force have been duly performed.

IN WITNESS WHEREOF, Assignor has subscribed its name hereto and caused its corporate seal to be attached hereto this 27th day of April, 1942.

(Corporate Seal) SULLIVAN PETROLEUM CORPORATION

(Attested and Acknowledged)

EXHIBIT A (Record, p. 12)

ASSIGNMENT OF OIL AND GAS LEASE

Know all men by these presents, That the undersigned, Sullivan Petroleum Corporation, a corporation incorporated by and under the laws of the State of Indiana, hereinafter called Assignor, for and in consideration of the sum of One Dollar ($1.00), receipt of which is hereby acknowledged, and other good and valuable consideration, does hereby bargain, sell transfer, assign and set over to The Ohio Oil Company, an Ohio corporation, hereinafter called Assignee, the following oil and gas leases so far as they cover the following described real estate in Sullivan County, State of Indiana, to-wit:

The Northeast ¼ of the Southwest ¼ of Section 3, Township 8 North, Range 10 West, said leases being described as follows:
The oil and gas leases dated the 6th day of June, 1940, and the 21st day of June, 1940, from Albert Poe and

Flora I. Poe, his wife, and Ural Hayden and Lura Hayden, his wife, all of Shelburn, Indiana, as lessors, and Vaughn F. Jones and George D. Gettinger, both of Sullivan, Indiana, as lessees, and said leases being recorded in the County Recorder's Office of Sullivan County, State of Indiana, in Book 40, pages 23 and 45, and by an assignment from the said Vaughn F. Jones and George D. Gettinger, of Sullivan County, State of Indiana, and said assignment having been duly recorded in the County Recorder's Office of Sullivan County, Indiana, in Book 40, at pages 70 and 71, and assigned to the Assignors by assignments duly recorded in the County Recorder's Office of Sullivan County, Indiana, in Record Book 41, page 211, and Record Book 41, page 382, insofar as said leases cover the following described land in Sullivan County, State of Indiana, to-wit: The East ½ of the Southwest ¼ of Section 3, Township 8 North, Range 10 West, and containing 80 acres, more or less, together with the rights incident thereto or appurtenant thereto.

And for the same consideration, Assignor does hereby sell, transfer, assign and set over to Assignee that certain test well for oil and gas now located on the premises above described and being known as Sullivan Petroleum Corporation's A. Poe No. 1, together with the casing now in said well. Assignee agrees that in the event the drilling operations hereinafter referred to result in the completion of said well as a dry hole, then in that event, Assignee will pull from said well all casing therein which can be pulled through ordinary methods and will deliver to Assignor on the premises above described such casing as can be pulled. Assignee further agrees that in the event the well is completed as a dry hole, it will plug said well in accordance with the laws, rules and regulations of the State of Indiana. Assignee further agrees that in the event the drilling operations hereinafter referred to result in the

completion of said well as a producing oil or gas well, then in that event, Assignee will deliver to Assignor casing equal in size, amount, kind and value to the casing now situated in said well, or will pay to Assignor the market value of the casing of like grade and size as that in said well.

Unless Assignee shall on or before the first day of June, 1942, commence or cause to be commenced operations for the deepening of a certain test well for oil and gas as now located in the Northeast corner of the Northeast ¼ of the Southwest ¼ of Section 3, Township 8 North, Range 10 West, Sullivan County, Indiana, and known as the Sullivan Petroleum Corporation's A. Poe No. 1, and prosecutes said operations with due diligence to a depth sufficient to test the oil and gas producing possibilities of that certain horizon at which that formation commonly known and referred to as the Niagra Limestone may reasonably be expected to occur, then this assignment and all rights hereunder shall terminate as to both parties and the oil and gas leasehold estate herein assigned shall revert to Assignor, their successors and assigns.

And for the same consideration, the Assignor covenants with the Assignee, its successors and assigns, that the Assignor is the lawful owner of and has good title to the interest above assigned in and to said lease, estate, rights and property, free and clear from all liens and encumbrances or adverse claims; that said leases are valid and subsisting leases on the land above described and all rents and royalties due thereunder have been paid and all conditions necessary to keep the same in full force have been duly performed.

IN WITNESS WHEREOF, Assignor has subscribed its name hereto and caused its corporate seal to be attached hereto this 26th day of April, 1942.

(Corporate Seal) SULLIVAN PETROLEUM CORPORATION

(Attested and Acknowledged)

THE ANSWER OF DEFENDANT

The answer of the defendant is not verified and may not be considered against the plaintiff in support of the motion of defendant for a summary judgment as it is not proof of any fact.

Certain exhibits to the answer, however, are properly authenticated and may be considered, being incorporated by reference in the affidavits filed in support of the motion for summary judgment. Exhibits, material to this appeal, are printed in full herein, or so much thereof is printed as is material.

Exhibits A and B are the so called Poe and Hayden assignments and will not be again printed.

Exhibit C is the Poe lease. So much thereof as is material reads as follows:

> "if the lessee shall commence to drill a well within the term of this lease or any extension thereof, the lessee shall have the right to drill such well to completion with reasonable diligence and dispatch, and if oil or gas, or either of them, be found in paying quantities, this lease shall continue and be in force with like effect as if such well had been completed within the term of years first mentioned" (Record page 46, line 33.)

Otherwise the lease contains the usual terms and conditions of an "unless" oil and gas lease.

Exhibits D, E, F, G, H, I, J, K, L and M to the answer are not material.

STATE COURT PROCEEDINGS

The Receiver filed a complaint against The Ohio Oil Company and others in the Sullivan Circuit Court to recover the reasonable market value of certain personal

property sold and delivered to The Ohio Oil Company by Sullivan Petroleum Corporation at its special instance and request including the casing in the Poe well, other defendants were made parties to answer as to any claim they might have (Record, page 68). The Ohio Oil Company filed an interpleader against plaintiff and its co-defendants admitting its indebtedness for the reasonable market value of the personal property, that it desired to bring said sum into court and thereupon be discharged as a party litigant and from any liability to any party, plaintiff or defendant (Record, page 78), whereupon the court made an order permitting Ohio to bring the sum owing into court and upon that being done discharged Ohio as a party and absolved it of liability to any party to the case, and did order the remaining defendants and plaintiff to interplead among themselves, that the sum so paid into court might be paid out to the owner of the personalty (Record, page 97).

In its interpleader The Ohio Oil Company made an allegation of the making of the Poe and Hayden assignments, Exhibits A and B, and attached copies thereof as exhibits but made no allegation or claim to or ownership of the leases arising or growing out of or by means of any other writing or agreement, alleging also that it still retained the title by those exhibits transferred to it. No where in the interpleader or proceeding did The Ohio Oil Company specifically assert itself to be the owner of the oil rights in the Poe leasehold or of the right to produce the oil therefrom. The statements in the interpleader were irrelevant to the issue of whether or not Ohio had purchased the personal property as claimed, or owed for it, and were disregarded by the court and the parties and no order or judgment was entered with respect thereto

(Record, page 79). The allegations of the interpleader as to the legal effect of the exhibits was controlled by the exhibits themselves, there being no claim of another or different contract.

Affidavit of Joseph F. Diver.

This affidavit is not material to this appeal, except as to the payment to Sullivan of certain sums of money as overriding royalty to be paid upon oil produced from the Hayden lease, and as to payment for casing made as provided by exhibit A, and to identify the minutes of the Board of Directors of Sullivan Petroleum Corporation of April 1, 1942, to which E. J. Giffel refers in his affidavit herein, which minutes appear in full herein, and will be identified in connection with the affidavit of E. J. Giffel.

Joseph F. Diver in his affidavit says that Ohio paid to this plaintiff all of the overriding royalty that has become due to Sullivan upon oil produced and marketed by Ohio from the Hayden oil and gas lease, upon the assignment exhibit B (Record, page 127 herein folio 226) as plaintiff in his complaint stated had been done. (Record, p. 131, Folio 231.)

Joseph F. Diver further states that Ohio has paid this Receiver for the casing in the Poe well (Record, p. 128, Folio 227.)

The Affidavit of E. J. Giffel. (Record, page 117.)

So much of this affidavit as is material is printed in full. Mr. Giffel says that Roy Myers, Secretary of Sullivan,

> "desired to make arrangements whereby such well could be drilled deeper to the Niagra Limestone" (Record, page 120, Paragraph 9.)

and that conferences were held with Myers,

> "attempting to work out mutually satisfactory arrangements and agreements between Ohio and Sullivan, having as their purpose the continued drilling of the Albert Poe well No. 1 to a greater depth sufficient to test the oil and gas possibilities of the underground formation called the Devonian Limestone, which in that area is sometimes known as the Niagra Limestone, also the further exploration on, and development of, the Albert Poe, Ural Hayden, and other leases in the immediate vicinity for the production of oil and gas, and also the acquisition by Ohio of title to certain leasehold interests then owned by Sullivan, including the Albert Poe and Ural Hayden lease, with Sullivan retaining certain oil and gas interest." (Record, page 120, Paragraph 10),

and further that the minutes of the Secretary of Sullivan, of the Board meeting of April 1, 1942, are,

> "accurately and correctly set forth the proceedings which took place at said meeting" (Record, page 121, Folio 217.)

The minutes so referred to by Giffel read as follows:

> "The president announced that the business of the meeting was to consider the possibility of arranging for the deepening of the Poe well No. 1, in Section 3, Township 8 North, Range 10 West, in Sullivan County, Indiana.
>
> The Secretary reported that the well had been drilled from 1,478 feet in the Salem formation to 1,650 feet in the Warsaw formation and because of the formation in his opinion it would be well to try to arrange for the completion of the well to the Devonian Lime, which would be encountered at about 2,300 feet, and that the Sullivan Petroleum

Corporation was without funds, and had been unable to raise funds, to permit the deepening of the well; that negotiations had been had with the Ohio Oil Company for the completion of the well and Mr. Giffel of the land department of the Ohio Oil Company was present and explained the condition under which the Ohio Oil Company would complete the well and develop the remaining acreage of the corporation; that the Ohio Oil Company would require an assignment of the lease of the forty acres on which said well was located.

Upon motion duly made by E. W. Haynes and seconded by Dr. S. H. Miller, the following resolution was unanimously adopted:

RESOLVED, That the president and secretary of this corporation be and are hereby authorized and directed to execute to the Ohio Oil Company an assignment of the lease to the following described real estate in Sullivan County, Indiana, to-wit: the northeast quarter of the southwest quarter of section 3, township 8 north, range 10 west.

BE IT FURTHER RESOLVED, That the president and secretary of this corporation shall be and hereby are authorized and directed to execute and assign any other leases to the Ohio Oil Company necessary or desirable for the development of the remaining leases held by the corporation, and to sign and execute any other contracts or instruments necessary or desirable to effectively carry out the purpose of this resolution" (Record, pages 133 to 135, Folios 233 to 235).

Mr. Giffel's affidavit proceeds, as follows:

"9. A well for oil and gas was commenced on the Albert Poe lease the last of September or first

of October in the year 1940, which said well was then and is now known as and commonly referred to as the 'Albert Poe Well No. 1', and is the same well referred to in the complaint as the Poe well. This well was commenced by certain individuals and said well and the lease upon which it was located were later acquired by Sullivan.

By the early part of the year 1942, as is alleged in paragraph nine of the complaint, the Albert Poe Well No. 1 had been drilled to a depth of 1,700 feet. Some time prior to February 14, 1942, the exact date not being now known to affiant, he first conferred with one Roy Myers who was then Secretary of Sullivan at Ohio's office in Marshall, Illinois. At that conference he was informed by Roy Myers that Sullivan desired to make arrangements whereby such well could be drilled deeper to the Niagra Limestone. The Albert Poe lease by its terms was expiring on June 6, 1942, and the Ural Hayden lease was expiring on June 21, 1942, unless production of oil could be secured upon the lands covered by said respective leases prior to the aforesaid dates."

"10. During the months of February and March, 1942, this affiant and other employees in his department investigated the ownership of the oil and gas rights in and under the lands covered by the Albert Poe lease, the Ural Hayden lease and other lands in the immediate vicinity (Record, page 120). Also during the month of February and March, 1942, this affiant had additional conferences with Roy Myers, as the representative of Sullivan, attempting to work out mutually satisfactory arrangements and agreements between Ohio and Sullivan, having as their purpose the continued drilling of the Albert Poe Well No. 1 to a greater depth and to a depth

sufficient to test the oil and gas producing possibilities of the underground formation called the Devonian Limestone, which in that area is also sometimes known as the Niagara Limestone, also the further exploration on, and development of, the Albert Poe, Ural Hayden and other leases in the immediate vicinity for the production of oil and gas, and also the acquisition by Ohio of title to certain leasehold interests then owned by Sullivan including the Albert Poe and Ural Hayden leases, with Sullivan retaining certain oil and gas interests."

"11. On April 1, 1942, this Affiant attended a meeting of the Board of Directors of Sullivan held at the residence of J. W. Corey in Moline, Illinois. There were present at that meeting the following directors: John W. Corey, Roy Myers, E. W. Haynes and Dr. S. H. Miller. At that meeting this Affiant submitted to the Board of Directors of Sullivan a proposal which involved, among other features, the acquisition by Ohio of title to certain oil and gas leasehold interests, including the Albert Poe lease and Ural Hayden lease, then owned by Sullivan, the retention by Sullivan of oil and gas interests in certain of those properties, and the further drilling of said Albert Poe Well No. 1 by Ohio to a depth sufficient to test the oil and gas producing possibilities of the Devonian Limestone. Said proposal in so far as it affected the Albert Poe lease and the Ural Hayden lease, was accepted on behalf of Sullivan by its Board of Directors and subsequently evidenced in writing in the respective assignments for those leases to Ohio." (Record, page 121.)

* * * * * * *

"17. Payment of the $1 consideration for each of the aforesaid assignments was made to Sullivan

for and on behalf of Ohio by Dudley F. Williams, an employee of said company as a landman in the Land Department under the supervision of this affiant. (Record, page 122.)

• • • • • • •

"19. After oil was discovered in commercially producing quantities in the Devonian Limestone, by the drilling of said Albert Poe Well No. 1 Ohio paid for the casing in said well in accordance with the provision of the assignment of the Albert Poe lease." (Record, page 123, Folio 219.)

THE MOTION FOR SUMMARY JUDGMENT

This motion reads as follows:

"Defendant, pursuant to Rule 56 of the Federal Rules of civil procedure, respectfully moves the court for summary judgment herein against the plaintiff and favor of the defendant, and as grounds therefor states:

"Plaintiff's alleged cause of action for damages for conversion of crude oil produced from said lands located in Sullivan County, Indiana, is predicated upon the proposition that the assignments made by Sullivan Petroleum Corporation to defendant for two oil and gas leases (identified as the Albert Poe and Ural Hayden leases) are invalid because of (1) insufficiency of consideration, and (2) lack of approval therefor by stockholders of Sullivan Petroleum Corporation.

"The pleadings in this case, the affidavits filed in support of this motion and the exhibits attached to such pleadings and affidavits, which exhibits are properly verified by affidavits, show that there is no genuine issue as to any material fact, and that

defendant is entitled to judgment as a matter of law, for the following reasons:

"1. The basic issue presented by plaintiff's complaint, the invalidity of the Poe and Hayden assignments, has already been adjudged adverse to plaintiff's position in two prior causes of action have never been questioned directly or indirectly. between these same parties, which adjudications Plaintiff's claim is therefore barred by res judicata or estoppel by finding.

"2. As a result of successfully asserting the validity of the Poe and Hayden assignments in two prior actions resulting in judgments legally enforcing the provisions of such assignments against this defendant, the plaintiff is now estopped to assert the invalidity of either of such assignments.

"3. The assignments of oil and gas leases described in plaintiff's complaint did not require approval of stockholders of Sullivan Petroleum Corporation.

"4. The assignments of oil and gas leases were supported by sufficient consideration."

(Record, pages 116, 117, Folios 209, 210.)

SUMMARY JUDGMENT

This judgment was as follows:

"The motion of the defendant for summary judgment pursuant to Rule 56(c) of the Rules of Federal Procedure having been presented and the Court being fully advised, now finds that there is no genuine issue as to any material fact and that the defendant is entitled to a summary judgment as a matter of law."

> "It is, therefore, Ordered, Adjudged and Decreed that the motion of defendant for summary judgment be, and the same is, sustained, that the plaintiff have had recover nothing by his complaint and that the costs of Court be assessed against plaintiff."
>
> (Record, pages 136, 137, Folio 238.)

The judgment above was affirmed on appeal by the Court of Appeals, 7th Circuit Record, page 148, herewith, 203 F. 2d 399.

CONCLUSION

In conclusion your petitioner respectfully represents and shows that the motion for summary judgment was stated to be made under Rule 56 and not 56(c); it stated reasons specifically and not generally, they were directed at the elimination of issues and only issues formed upon the cause of action founded upon the alleged invalidity of the Poe and Hayden assignments. It was a motion for partial summary judgment proper under Rule 56(d) and an order restricting the issues to the remaining cause of action should have been made and was the only action that properly could have been taken in sustaining the motion.

The remaining cause of action, being restricted to recovery for the value of the oil from the Poe property, was and is sustainable without attack upon these instruments and by treating them as valid. The Hayden assignment being an agreement to transfer the Hayden, Williams and Walters leases in consideration of Ohio finishing the drilling of the nearly completed Poe well for the use and benefit of Sullivan in the production of oil by Sullivan should it be found; the Poe assignment being a grant of the use of

the leased premises to enable Ohio to complete the drilling of the Poe well that Ohio might thereby pay the consideration agreed upon for the Hayden, Williams and Walters leases.

The rental agreement, exhibit F, was in furtherance of the general object sought to be accomplished, by performing a two fold purpose, first to permit Ohio the use of Sullivan's drilling equipment in place to finish the well, second to keep the drilling equipment in place for that purpose until Ohio had exercised its optional right to deepen the well, operations for which had to be commenced under the options by June 1, 1942; by maintaining the equipment in place Sullivan retained to itself its right as well as its ability to resume its own drilling of the well within the period of the lease and thus avoid its expiration.

In view of the confused reasoning of the Court of Appeals it is important to note the careful saving of the period of June 1 to June 6 by each of the exhibits A, B, and F, by Sullivan. This is the period between the expiration of Ohio's optional rights and the end of the leased term if no well is then being drilled. Sullivan was not without hope. Sullivan was not in a state of desperation. Sullivan did not surrender its rights to Ohio, it gave Ohio a specified period to decide whether or not it would deepen the Poe well for the Williams, Walters and Hayden leases. Sullivan protected its interest in that well in event Ohio did not decide to deepen the well by providing for the expiration of Ohio's optional rights by June 1st.

The Poe well and the pipe in the well belonged to Sullivan and never belonged to Ohio and never was intended to belong to Ohio, its value was a measure of part of what Ohio should pay for the Hayden, Walters and Williams leases. Ohio on deciding to exercise its optional rights to finish the well for those leases, was confronted

with these conditions: (1) Sullivan's drilling equipment was in place ready for drilling operations to be resumed, (2) Sullivan had its casing pipe in the well. Ohio found it expedient to provide for the use of both, which must either be used or replaced by Ohio in order that Ohio might deepen the well, (3) there was the possibility of a dry hole at the end which must be plugged by the party responsible for the dry hole according to law.

Exhibit F made provision for the use of the drilling equipment.

Exhibit A, made provision for the use of the casing. The use of the casing was to be without charge in event of a dry hole, Sullivan taking the gamble of its damage or loss in that event, but if a producing oil well resulted, which would greatly enhance and prove the value of the Hayden, Williams and Walters leases received by Ohio for finishing the well, Ohio was to pay Sullivan the value of the casing, in substance Sullivan risked its pipe against a producing well; Ohio was willing to pay that much more for the Hayden, Williams and Walters leases if the venture was a success, for the free use of the casing pipe if it was not.

Exhibit A made provision for the plugging of the well by Ohio if a dry hole. The well belonged to Sullivan in all events and therefore Sullivan owed the duty under the law to plug a dry hole, Ohio assumed this duty. It is an acknowledgment of Ohio that Sullivan was to "own" the Poe well at the conclusion of drilling operations. Ohio would not contract with Sullivan to perform its obligation to the State of Indiana to plug a dry hole it had drilled. Sullivan was considered as drilling the well because it was in fact Sullivan's well.

It is respectfully submitted that if the interpretation of the agreement could be as petitioner has here interpreted

it and demonstrated it to be, the decision of the court that it was otherwise demonstrates that a genuine issue of material fact existed, and the court's decision that it could determine that disputed issue of fact violates the rule 56 (c) and is in conflict with applicable decisions of all the Courts of Appeal on the same matter.

It is respectfully urged that the many errors herein set out has resulted in such a departure from the accepted and usual course of judicial proceedings that plaintiff has been denied his day in court by a summary and unwarranted denial of his rights. *First* plaintiff was taken off guard by having a special motion to eliminate a particular issue being acted upon as a general motion and his entire claim dismissed, *Second* by having the court of Appeals disregard this error when assigned as error on appeal, *Third* by the Court of Appeals determining what the contract was upon its determination of genuine issues of fact upon which it founded and predicated its determination of what the contract was, all of which was contrary to established rules and law establishing an accepted and usual and known course of judicial proceedings.

The grant of the use of premises to prospect is customarily accompanied by a promise to pay a royalty upon oil discovered and produced. The royalty thus provided is held to support a grant of the right to produce oil. In dealing with ordinary property a grant might be supported by an implied promise to pay reasonable value. Oil contracts generally make no promise to make a royalty available, without which the royalty provision amounts to nothing until production is had.

Provisions for the payment of sums of money out of oil do not of themselves give rise to an obligation to drill wells for the purpose of creating funds for the payment of such sums of money. *Watchorn v. Roxana Pet. Corp.*, 5 Fed. 2d 363 CA 2d; *Smith v. Louisiana Oil Ry. Co.*, 12 F. 2d 378 CA 8th; *Allen v. Phillips Pet. Corp.*, 13 F. 2d 584 CA 8th; *Casden v. Cline*, 26 F. 2d 631 CA 8th, also 11 Fed. 2d 760 CA 2nd.

Thus there is no foundation for an implied promise to pay for the right to produce the oil.

Furthermore, due to the nature of oil, the uncertainty of its existence, or amount, in any particular property, its value would be so uncertain and so difficult of being ascertained, that it would not support a judgment upon an implied promise to pay its reasonable value for its acquisition.

Owing to the uncertainty accompanying the peculiar nature of, and circumstances surrounding the production of oil, no consideration can be supplied by implication based on a value so very difficult of measurement and so uncertain of reasonable determination.

We need not rely solely upon this legal effect of Exhibit A, but we have positive evidence in Exhibit B, that the oil if any be discovered, was intended to supply payment to Sullivan for its transfer to Ohio of the Hayden, Williams and Walters leases.

An interpretation of the Poe assignment compatable with undisputed local law compels a determination that its legal effect is to grant a use only to prospect by deepening

the Poe well. The language of the Court of Appeals 7th C. A. as set out in *Federal Oil Co. v. Western Oil Co.*, 12 Fed. 674, 5, 6 is a concrete declaration of this local law.

In this case the decision seeks to by-pass this rule of local law by adding a consideration in the Poe assignment which is not expressed, and which can not be inserted by implication. This by-pass is by indefinite and uncertain indication by the Court of Appeal's decision in a vague statement that the consideration must have been the same as supported Exhibit B, the Hayden assignment. (R., p. 156).

The consideration for the Hayden assignment was the deepening of the Poe well. The overriding royalty provision in the Hayden assignment provided no consideration for that assignment there being a present consideration for that assignment, the deepening of the Poe well, and there being no obligation to make the overriding royalty available. *Phoenix Oil Co. v. Mid-Continental Pet. Corp.*, 117 Okla. 530, 111 A. L. R. 510.

A present consideration for the Hayden assignment being the deepening of the Poe well the Court of Appeals surely could not have intended reference to the overriding royalty clause of the Hayden assignment as being a consideration for the Poe assignment

It is likewise rather difficult to perceive how one could say that the well which was required to be deepened by assignee in order to pay for the Hayden, Williams and Walters leases, was to be the property of the assignee who must deepen the well to pay for the Hayden, Williams and Walters leases. The Poe lease was omitted from the

destination of leases that Ohio was to obtain for deepening the Poe well (Exhibit B). This reasoning of the court leads to an unbelievable result, a destruction of the present consideration stipulated to be rendered as payment for the Hayden, Williams and Walters leases. This result refutes the idea that the Sullivan Petroleum Corporation was to receive something for its property.

It is a convincing demonstration that the finding of fact that Sullivan was in a "state of desperation" was of great influence with the court in its decision that there was some consideration, not very much, just a little bit, that *might be realized in the unpredictable future* that was sufficient consideration to Sullivan in its "state of desperation" to provide a means by which the incohate right (right of use) granted by the Poe assignment might ripen into a vested estate as a result of the overriding royalty provision of the Hayden lease assignment, Exhibit B. This by-pass was an effort to bring this case within the local law which declares that an incohate right granted can ripen into a vested right to produce the oil *in cases where a provision is made for the payment of a royalty* upon oil made available *by the prospecting permitted.*

Your petitioner, Joe W. Lowdermilk, Receiver of Sullivan Petroleum Corporation, respectfully prays that a writ of Certiorari be issue out of and under the seal of this court to review the decision of the United States Court of Appeals for the Seventh Circuit, rendered on April 6, 1953 which affirmed a judgment of the United States District Court for the Southern District of Indiana, Indianapolis Division, which found that there was no genuine issue as to any material fact, and that the defendant was entitled

to a summary judgment and adjudged that plaintiff have and recover nothing by the complaint and that the costs of court be assessed against the plaintiff.

JOE W. LOWDERMILK, Receiver
Sullivan Petroleum Corporation

By [signature]
JOHN W. BECKER,
[redacted]

CLARENCE R. MARTIN,
Counsel for Petitioner.

Date: June 30, 1953.

FILED
SEP 14 1953
HAROLD B. WILLEY, Clerk

IN THE

Supreme Court of the United States

OCTOBER TERM, 1953.

No. 158

JOE W. LOWDERMILK, RECEIVER OF SULLIVAN PETROLEUM CORPORATION,
Petitioner,

vs.

THE OHIO OIL COMPANY, A CORPORATION,
Respondent.

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

JOSEPH F. DIVER,
HUBERT HICKAM,
THOMAS M. SCANLON,
LESTER IRONS,
JERRY P. BELKNAP,
Attorneys for Respondent.

BARNES, HICKAM, PANTZER & BOYD,
1313 Merchants Bank Building,
Indianapolis 4, Indiana,
Of Counsel.

THE GUNTHORP-WARREN PRINTING COMPANY, CHICAGO

INDEX.

	PAGE
Definitions and Abbreviations	1
Statement of the Case	3
Summary of Argument	8
Argument	9
I. There Was No Genuine Issue of Material Fact with Respect to Petitioner's Claim Based on the Poe Assignment and Summary Judgment Was Properly Entered	9
II. Summary Judgment Was Properly Entered Under Rule 56(c), F. R. C. P.	14
Conclusion	16

Table of Cases Cited.

New Harmony Realty Corp. v. Superior Oil Co. (1941), 108 Ind. App. 668, 31 N. E. 2d 673	10
Securities and Exchange Comm. v. Chenery Corp. (1943), 318 U. S. 80	15
Smith v. Mercer (1948), 118 Ind. App. 575, 79 N. E. 2d 772	11

Federal Rules of Civil Procedure Citations.

Rule 56(c)	3
Rule 56(d)	14
Rule 56(f)	3

IN THE

Supreme Court of the United States

OCTOBER TERM, 1953.

No. 158.

JOE W. LOWDERMILK, RECEIVER OF SULLIVAN PETROLEUM CORPORATION,

Petitioner,

vs.

THE OHIO OIL COMPANY, A CORPORATION,

Respondent.

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

DEFINITIONS AND ABBREVIATIONS.

In the interests of convenience and brevity, the following expressions used in this Brief are used with the following meanings:

Sullivan—Sullivan Petroleum Corporation, of which petitioner is receiver.

Ohio—The Ohio Oil Company, respondent.

Sullivan County litigation—Proceedings in Cause No. 29927 of the Circuit Court of Sullivan County, Indiana, styled "Joe W. Lowdermilk, Receiver of Sullivan Petroleum Corporation *vs.* The Ohio Oil Company, *et al.*" (R. 61-116.)

Poe Assignment—Assignment dated April 26, 1942, made by Sullivan to Ohio of Poe Lease, as the same is hereinafter identified. (R. 12.)

Poe Lease or Poe Leasehold—The oil and gas leases and leasehold estate created thereby covering the Northeast Quarter of the Southwest Quarter of Section 3, Township 8 North, Range 10 West, Sullivan County, Indiana. (R. 44-49, 50-56.)

Test Well—Test well for oil and gas located on the Poe Leasehold, which said Well is more fully identified as the A. Poe Well # 1 or Albert Poe Well # 1 and referred to in the Poe Assignment and the Hayden Assignment as Sullivan Petroleum Corporation's A. Poe Well # 1.

Hayden Assignment—Assignment dated April 27, 1942, made by Sullivan to Ohio of the Hayden Lease, as the same is hereinafter identified, and other leases and leasehold estates situated in Sullivan County, Indiana. (R. 41-43.)

Hayden Lease or Hayden Leasehold—The oil and gas lease and leasehold estate created thereby covering the Southeast Quarter of the Southwest Quarter of Section 3, Township 8 North, Range 10 West, Sullivan County, Indiana. (R. 50-56.)

F.R.C.P.—Federal Rules of Civil Procedure.

STATEMENT OF THE CASE.

Petitioner's complaint demanded judgment against respondent for the value of all oil produced by respondent from the Poe Leasehold and the Hayden Leasehold, claiming that the assignments of such leasehold interests to respondent disposed of substantially all of Sullivan's property, were not made in the regular course of business, were made without consideration, and did not have the approval of Sullivan's shareholders. (R. 6-14.) Respondent thereafter moved for summary judgment under Rule 56, F.R.C.P., on the ground that the assignments of the leasehold interests to it were valid and had been so adjudicated in the Sullivan County litigation, and were supported by sufficient consideration. Respondent filed with and in support of such motion the affidavits of E. J. Giffel and Joseph F. Diver with certified copies of pleadings in the Sullivan County litigation as exhibits. (R. 116-135.) Petitioner filed no counteraffidavits or affidavits under Rule 56(f), F.R.C.P. The District Court thereafter granted respondent's motion and entered judgment for respondent under Rule 56(c), F.R.C.P. (R. 135-6.)

Petitioner thereupon immediately perfected an appeal to the Court of Appeals, and abandoned all claim founded on the Hayden Assignment (R. 139), but claimed error only in the ruling as to the Poe Assignment. The Court of Appeals affirmed the judgment of the District Court, and petitioner now seeks a writ of certiorari to review this judgment.

The facts established by the record, including respondent's affidavits and the complaint, are as follows:

Immediately after its incorporation on August 27, 1941,

Sullivan acquired by assignment certain oil and gas leases upon land situated in Sullivan County, Indiana, among which were the Poe Lease and the Hayden Lease. (R. 7.)

Late in 1940 a test well had been commenced on the Poe Leasehold by Sullivan's predecessors in interest. By the early part of 1942 Sullivan had drilled this test well to a depth of 1,650 or 1,700 feet in the Warsaw formation. (R. 120, 133.) The underlying lease on the Poe Leasehold was executed on June 6, 1940, and was for a term of two years and as long thereafter as oil and gas was produced. (R. 44-45.) The underlying Hayden Lease was executed June 21, 1940, and had a similar term. (R. 50.)

Conferences were held during February and March, 1942, attempting to work out a satisfactory arrangement between Ohio and Sullivan so that the Test Well would be drilled deeper to a depth sufficient to test the oil and gas producing possibilities of the underground formation called the Devonian Limestone which in that area is also known as the Niagara Limestone. (R. 121.)

On April 1, 1942, Giffel attended a special meeting of Sullivan's Board of Directors called to consider the problem. (R. 121.) Sullivan's Secretary stated that the Test Well had been drilled to 1,650 feet and he believed it would be advisable to try to drill it to the Devonian lime which would be encountered at about 2,300 feet. He pointed out that Sullivan was without funds and had been unable to raise funds so to deepen the well, and reported on the negotiations with Ohio to undertake the job. Giffel stated that Ohio would complete the well and develop Sullivan's remaining acreage but on condition that Ohio get an assignment of the lease for the 40 acres on which the Test Well was located. (R. 133-4.)

The Sullivan Directors thereupon unanimously adopted resolutions authorizing and directing the officers to execute

to Ohio an assignment of the Poe Lease and to assign any other leases to Ohio necessary or desirable for the development of Sullivan's remaining leases. The Secretary was also authorized and directed to make such contracts as might be necessary for the use of the drilling rigs standing over the Test Well, together with tools and other equipment, and to make such contracts with Ohio as might come up from time to time. (R. 121-2, 133-4.)

Pursuant to these resolutions, on April 25, 1942, Ohio entered into a rental contract with Sullivan for the rental of a drilling machine and drilling tools which were on the Poe Leasehold and had previously been used by Sullivan. (R. 123, 59-60.)

On April 26, 1942, Sullivan duly executed and delivered to Ohio a written assignment of the Poe Lease, the Test Well and all casing in the well, and on April 27, 1942, a written assignment of the Hayden Lease was duly executed and delivered to Ohio. The Hayden Assignment covered leasehold interests owned by Sullivan other than the Poe Lease, including the Hayden Leasehold immediately adjacent to the Poe Leasehold. (R. 41-43, 122.)

The Poe Assignment contained a provision that unless Ohio should, on or before the first day of June, 1942, commence operations for the deepening of the Test Well and prosecute said operations with due diligence to a depth sufficient to test the oil and gas producing possibilities of the horizon at which the formation commonly known and referred to as the Niagara Limestone might reasonably be expected to occur, the assignment and all rights thereunder would terminate as to both parties and the oil and gas leaseholds so assigned would revert to Sullivan. The Poe Assignment also contained an agreement on the part of Ohio that if the drilling resulted in a dry hole it would pull from the Well all casing which could be pulled through

ordinary methods for delivery to Sullivan on the premises and plug the Well; further, that if the drilling resulted in a producing oil or gas well, Ohio would deliver to Sullivan casing of the same kind and value as then located in the Well or pay the market value thereof. (R. 13.) The Hayden Assignment had a similar provision as to deepening the Test Well, but provided that if oil were found in paying quantities at a lesser depth, the condition would be deemed satisfied. The Hayden Assignment also provided for an overriding royalty to be paid Sullivan of 1/32 of all oil and gas produced on the leasehold. (R. 42.) The Poe Assignment contained no such provision. (R. 12-14.)

Ohio accepted the Poe and Hayden Assignments and had them duly recorded. In compliance with the condition set forth in each of the assignments, it commenced operations for the deepening of the Test Well prior to the first day of June, 1942, and prosecuted such operations with due diligence until the Well reached the Devonian Limestone at a depth of approximately 2,300 feet, where oil was discovered in paying quantities. (R. 123.) Ohio subsequently drilled a producing well on the Hayden Leasehold. (R. 123.)

Thereafter petitioner was duly appointed receiver for Sullivan (R. 7, 62), and in August, 1943, commenced the Sullivan County litigation by filing suit in the Sullivan Circuit Court against Ohio and other parties. His complaint in three paragraphs sought payment of a debt arising out of the rental by Ohio of certain machinery covered by the rental contract of April 25, 1942; recovery of the value of the casing in the Test Well and other materials used in connection with the conserving of oil produced on the Poe Leasehold; and recovery of the 1/32 overriding royalties due under the terms of the Hayden Assignment. (R. 66-71.)

Ohio answered and filed a counterclaim in the nature of an interpleader (R. 78-82) averring the conveyances made

by the Poe and Hayden Assignments, that the Test Well had been deepened and completed as a producing well, admitting its obligations and averring that conflicting claims of petitioner and the other parties named had been made on it for the amounts concededly due. Petitioner then replied to the counterclaim (R. 89-90) and the other parties filed appropriate pleadings.

The matter was finally adjudicated by the judgment entered October 15, 1943 and November 2, 1943 (R. 95-103), finding the facts in question, on the former date ordering Ohio to pay the sums owing by it into court, and on the latter date declaring petitioner entitled to substantially all sums so paid. Petitioner received the money to which he was entitled pursuant to such judgment and has never questioned or attacked such judgment directly or indirectly. (R. 128-129.)

SUMMARY OF ARGUMENT.

I. The controversy between the parties is based on the construction of a written instrument, the Poe Assignment. The terms of the instrument are plain and unambiguous and the Court of Appeals correctly concluded under the applicable Indiana law that it was not open to construction by use of parol evidence outside the four corners of the instrument. The Court of Appeals considered all the decisions cited by petitioner as establishing a rule of local law contrary to its decision and correctly concluded that those decisions supported its decision. The instrument was before the Court and there could be no genuine issue of material fact as to its construction. Summary judgment was thus properly entered.

II. Respondent's motion was for summary judgment, and not merely an order restricting the issues under Rule 56(d). There is no basis for petitioner's claim of surprise as to the scope of the judgment entered since he made no claim below that the judgment granted relief broader than requested. The judgment of the District Court was correct and could not be set aside merely because petitioner asserted on appeal a different theory of his claim which is bad as a matter of law, as the Court of Appeals found, and thus furnishes no basis for a different result.

ARGUMENT.

Petitioner asserts that eight questions are presented to this Court by his petition for certiorari (Petition, pp. 3-4), and makes seven lengthy assignments of error complained of. (Petition, pp. 6-9.) Several of the questions presented and errors complained of will be grouped for purposes of discussion.

I. There Was No Genuine Issue of Material Fact With Respect to Petitioner's Claim Based on the Poe Assignment and Summary Judgment Was Properly Entered.

Petitioner concedes that the controversy grows out of the Poe and Hayden Assignments and its determination is dependent upon their interpretation. (Petition, p. 10.)

The basic question here thus is whether the Courts below erred in the construction of the Assignments. Petitioner urges that error was committed, since on his theory of construction the Poe Assignment was only "a grant of the use of the leased premises to enable Ohio to complete the drilling of the Poe Well." (Petition, pp. 29-30.) Or, as stated in his petition for rehearing filed with the Court of Appeals below, petitioner's claim is that "although the Poe Assignment declares a sale, transfer, assignment and setting over to Ohio of the well and of the pipe, it is plain and certain that the writing was not intended to mean what it said." (R. 187.) Petitioner then makes a long and involved analysis of the assignments on a theory that even the Court of Appeals below found difficult to understand. (R. 153.)

The basic difficulty with petitioner's theory is that it is

belied by the instruments of assignment themselves. The Court of Appeals correctly concluded that under the plain, unambiguous phraseology of both assignments, Ohio upon performance of the conditions specified became the owner of the property described, including the Poe Well and the oil produced therefrom. (R. 153, 155-6.) Under the law of the State of Indiana which must control this transaction, the Courts below could have reached no other result.

The Poe Assignment on its face is an absolute assignment by Sullivan to Ohio of all its oil and gas leasehold interest in the described real estate and of the Test Well and casing located on the premises. The leasehold interest assigned necessarily included the right to produce and market any oil found, since that was the main interest created by the assigned leases. The language used in the Poe Assignment is clear and unambiguous. The applicable legal principles under Indiana law are plain. In *New Harmony Realty Corp.* v. *Superior Oil Co.* (1941), 108 Ind. App. 668, 31 N. E. 2d 673, in dealing with a matter of interpretation of an oil lease, the court said:

> "We recognize and are in accord with the principle that the intention of the parties at the time the contract was entered into is the controlling factor in determining what the agreement of the parties actually was, *but when the language used in the contract is plain, simple, without ambiguity, and there has been no fraud or deception practiced to induce the execution of such an agreement, the intention of the parties must be taken from within the four corners of the instrument presented for consideration.*
>
> "If there arises a doubt as to the intention of the parties through imperfect expressions, the aid of courts may be invoked *but the courts have no right to make a new contract changing the rights or liabilities of the parties thereto.*
>
> "The restriction as well as the power of courts in this respect is clearly set out in an opinion of this

court in the case of *Illinois Pipe Line Co.* v. *Brosius* (1939), 106 Ind. App. 390, 20 N. E. (2d) 195, in which the court says:

> " 'It is one thing for the court to effectuate the intention of the parties to the extent to which they may have, even imperfectly, expressed themselves, and another to add to the instrument all such covenants as upon a full consideration the court may deem fitting for completing the intentions of the parties, but which they, either purposely or unintentionally, have omitted. The former is but the application of a rule of construction to that which is written; *the latter adds to the obligations by which the parties have bound themselves, and is of course quite unauthorized, as well as liable to great practical injustice in the application.*'
>
> "We think the intent of the parties can easily be obtained from their contract in this case and the terms of their agreement, not only leave no room for implication, but provide against it." (108 Ind. App. 678-9, 31 N. E. 2d 677.)*

The same court in *Smith* v. *Mercer* (1948), 118 Ind. App. 575, 79 N. E. 2d 772, stated the rule:

> "However, there must be some element of doubt, obscurity, uncertainty, or ambiguity in the terms of the contract before the acts of the parties in interpreting such contract can be used to determine the intent and meaning of the terms employed. *When the terms of the contract are plain, intelligible, and free from doubt and uncertainty, rules of construction are unnecessary and of no possible service. In such a case, it is not the proper function of the courts by any rules of interpretation or construction to make another an entirely different contract for the parties from the one they made for themselves.* *Morris* v. *Thomas*, 79 N. E. (1877), 57 Ind. 316." (118 Ind. App. 583-4, 79 N. E. 2d 776.)

---

* All emphasis ours unless otherwise noted.

Petitioner does attempt to evade the force of these authorities by trying to create some ambiguity in the Poe Assignment, but the effort is so strained that, as has been seen, petitioner is forced to argue that the writing was not intended to mean what it said. As the Court of Appeals noted, there is no allegation in the complaint and no contention that Ohio practiced any fraud or deception upon Sullivan in the procurement of the assignments or that they were entered into other than at arm's length. (R. 152-3.) There is likewise no claim or contention of any mistake to justify reformation of the instruments. Under Indiana law, the instruments must thus be enforced according to their plain terms.

Petitioner's further contention that the decision of the Court of Appeals is contrary to local law is utterly without merit. The decisions cited by petitioner in support of this thesis (Petition, p. 6) were all considered and disposed of by the Court of Appeals in its opinion (R. 153-5), and after reviewing them, that Court concluded:

> "Under the rationale of these cases, as well as others which could be cited, we see no escape from the conclusion that Ohio by performance acquired title and ownership to the oil rights covered by the two assignments and to the oil produced therefrom." (R. 155.)

Nothing of value can be added to that Court's careful consideration of the decisions here cited by petitioner and its conclusion from them.

In view of the foregoing legal principles and their application by the Court of Appeals, there is no basis whatever for petitioner's argument that the Courts below erred in determining genuine issues of material fact and basing a judgment on such determination. The only issue presented was the interpretation of a written instrument, and the Court of Appeals correctly determined that the plain,

unambiguous language of the instrument left no room for interpretation or going outside the four corners of the instrument to determine its meaning. That Court did consider the details of the Sullivan County litigation as constituting a practical construction by the parties of the Poe Assignment conformable to its plain terms, but carefully pointed out that the point was material only on the assumption, which it thought was *not* a fact, that the instruments were open to construction. (R. 157.) Again, that Court made some discussion of the situation of the parties at the time of execution of the instruments in discussing petitioner's argument that the plain terms of the instrument produced what he regarded as an unconscionable result, but the Court prefaced the matter by pointing out it thought there was no merit in the argument (R. 159), and clearly under the applicable principles of Indiana law, there is none.

It may be noted that while the petition for certiorari does have some discussion of the consideration for the assignments, the point involves a construction of the terms of the instruments. The Court of Appeals considered the point and concluded there can be no question of the sufficiency of the consideration to support each assignment. (R. 155-6.) The record furnishes no basis for establishing that that Court erred in reaching such conclusion.

There is thus no basis for any argument that there was any issue of fact open to be considered in the disposition of the case. Petitioner's theory concededly rests on the interpretation of a written instrument. That instrument was before the Court. It is plain and unambiguous in its terms and there is simply no room for construction of it or resort to parol evidence outside the instrument to determine its

meaning. The Court of Appeals correctly so concluded and Indiana law allows no other result. In the circumstances, the summary judgment remedy was properly available and correctly applied.

II. Summary Judgment Was Properly Entered Under Rule 56(c), F. R. C. P.

Petitioner's final desperate thrust is that the motion for summary judgment in this cause was really only a motion for partial summary judgment under Rule 56(d), and thus only a limited judgment should have been entered. It is also argued that petitioner was taken off guard and surprised by the judgment entered. There is no more substance to this argument than any other advanced in the petition.

Respondent's motion for summary judgment (R. 116-7) asked for relief under Rule 56 and clearly sought a complete judgment. No suggestion was advanced of a partial judgment under Rule 56(d), and the District Court properly entered judgment disposing of the entire claim. Petitioner's claim of surprise at this is itself astonishing. Petitioner made no attempt whatsoever to suggest to the District Court by appropriate motion that the scope of the motion for summary judgment had been misconceived or that the District Court had erred in not limiting its disposition of the motion merely to an order restricting the issues. Again, in the statement of points on appeal to the Court of Appeals, petitioner gave no hint of any claim that the District Court had taken him by surprise by entering summary judgment under Rule 56(c) rather than 56(d) (R. 138-139). On this record, petitioner's present claims of surprise and being taken off guard can find no support.

Petitioner did indeed invent a different legal theory for recovery after the adverse District Court judgment and

advanced it to the Court of Appeals. That new theory, however, was premised on an argument that the Poe Assignment did not mean what its terms clearly and unambiguously said. As has been seen, this theory presents a pure question of law as to the interpretation of a written instrument. The Court below decided correctly, pursuant to controlling local law, that the instrument was valid and was not open to construction on the basis of consideration of parol evidence outside the four corners of the instrument, and that it must be interpreted according to its plain terms. Unless it can be held that the Court erred in so concluding, there can be no basis for holding that it should have sent the case back to the District Court merely to consider a theory of recovery that as a pure matter of law could not be sustained.

There is no novelty about the case of a defeated litigant trying to advance a new legal theory on appeal, and that is all petitioner did here. His difficulty is that he has no valid claim under any theory, and the judgment of the District Court was right under any theory advanced by him. If an appellate court must affirm a decision of a lower court which is correct although based on a wrong reason, on the basis of avoiding the waste of remanding the case for reinstatement of the decision on a different ground, cf. *Securities and Exchange Comm.* v. *Chenery Corp.* (1943), 318 U. S. 80, 88, no less favorable rule can apply here where a defeated party asserts a new legal theory on appeal which is found to be as bad in law as his original theory.

Conclusion.

It is obvious from the record and the authorities that this case presents no question that warrants review by this Court. Petitioner's present theory of the case concededly rests on the interpretation of a written instrument, and is premised on the theory that the instrument does not mean what it says. He claims that evidence outside the instrument will somehow support his interpretation, but the Court of Appeals held, correctly under established principles of local Indiana law, that the terms of the instrument are plain and unambiguous and not susceptible to construction by light of parol evidence. Petitioner says that Court misapplied the local law, but it analyzed every decision petitioner now cites as establishing the local law, and concluded that those same decisions required rejection of petitioner's theory. In short, petitioner's claim that the summary judgment remedy was not available because of the existence of genuine issues of material fact is proscribed by the applicable local law which holds that no evidence outside the terms of the written instrument may be considered.

Petitioner has taken every conceivable position in his effort to cut in on the output of an oil well found to be successful after the corporation he represents had assigned away its interest in the well. His first position taken in the Sullivan County litigation in 1943 was that the Poe and Hayden Assignments were valid and meant what they said. In 1950 when he filed this suit he urged both Assignments were invalid. In 1952 on appeal from an adverse judgment rendered by the District Court he conceded the Hayden Assignment was valid, but as to the Poe Assignment he argued it cannot mean what it plainly says, or is invalid if it does, or must have a provision added by implication to avoid its plain legal effect. He now makes a final

attempt to show the Court of Appeals erred in failing to construe the Poe Assignment into an entirely different instrument comporting to his expectations.

Under any theory advanced, petitioner has no legal basis for recovery, and the judgment below is the only one that could have been entered.

The petition is without merit and should be denied.

Respectfully submitted,

JOSEPH F. DIVER,
HUBERT HICKAM,
THOMAS M. SCANLON,
LESTER IRONS,
JERRY P. BELKNAP,
Attorneys for Respondent.

BARNES, HICKAM, PANTZER & BOYD,
1313 Merchants Bank Building,
Indianapolis 4, Indiana,
Of Counsel.

18

Office - Supreme Court, U. S.
FILED
OCT 5 1953
HAROLD B. WILLEY, Clerk

IN THE

Supreme Court of the United States

OCTOBER TERM, 1953

No. 158

JOE W. LOWDERMILK, Receiver of Sullivan Petroleum Corporation,

Petitioner,

v.

THE OHIO OIL CO., A Corp.,

Respondent.

PETITIONER'S REPLY BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

GARRETT W. OLDS,
JOHN W. BECKER,
CLARENCE R. MARTIN.
Counsel for Petitioners.

INDEX AND SUMMARY

Point		*Page*
I, IX	Specific errors were assigned for writ of error which have not been separately or specifically answered or discussed by respondent	1, 28
II	The writings are three in number, the first provides for an option to use drilling equipment to deepen the well; the second provides for an option to use the well and lease upon which the well is being drilled to deepen the well. The third is the main contract which stipulates the purpose and consideration	3
	No obligation is assumed by Ohio—either to deepen the well or pay anything—every undertaking upon Ohio's part is subsidiary to an option to deepen the well	
III	The Ohio Oil Company was a party to litigation that was instrumental in establishing the local law on the subject of the interpretation of oil and gas contracts and was in that litigation made familiar with the fact that in Indiana words of absolute conveyance of mineral rights do not mean what they clearly import but are grants of options only to explore for the minerals	5, 8

Point *Page*

The local law as established has not been recognized in this case. It has been studiously avoided by a partial discussion of precedent which precedent established the law in Indiana..... 5

The argument that Ohio obtained all the oil rights in sight is not new to Ohio. It made the same arguments in Ohio Oil Co. v. Detamore, 165 Ind. 243 as is made here but without success by the administrators of the local law..... 8

IV The rule of construction of oil and gas contracts applies special rules peculiarly applicable to them because of their peculiar nature and the nature of oil and gas 14

V The purpose of the agreement, the object to be accomplished and the consideration is clearly expressed in the writing exhibit B to be the deepening of the Poe well for Sullivan in consideration of Sullivan transferring to Ohio the Hayden, Williams and Walters leases..... 17

VI A new contract was substituted by the decision for that stipulated in the writing exhibit B by conjecture and speculation in disregard of known and undisputed fact, or fact from which it could reasonably be believed that exhibit B set forth the consideration to be the deepening of the Poe well for the other leases..... 19

Point *Page*

The substituted object and consideration made a new contract by which Sullivan transferred without present or promissory consideration its properties to Ohio

VII To arrive at the new contract the court weighed the facts on the motion for summary judgment and therefrom determined the contract to be as stated in the decision, and in doing so the court,

(a) ignored the condition stipulated in exhibit B that the well was to be deepened by Ohio for the Hayden, Williams and Walters leases

(b) In the place of the condition set out in exhibit B the court upon conjecture and speculation found that there was an understanding that ownership of the Poe well and lease was to vest in Ohio upon the deepening of the Poe well. Thus was inserted in the exhibit B by the court a description of the Poe well and Poe lease so that this lease would not be omitted from the clause thereof stating or enumerating the leases Ohio was to receive as its pay for deepening the Poe well 22

No request was made by Ohio for reformation of exhibit B..... 18

Point *Page*

(c) From the unverified and argumentative answer the court found that Sullivan was financially prostrate and in its state of desperation was not in position to contract but only to rid itself of its properties in the hope that in some way, at some time, by some means or other, it might receive something

(d) Neither of these findings of fact can be sustained, each conflict with established undisputed fact. The established and undisputed fact sustains the contract of the parties that Ohio was to receive the Hayden, Williams and Walters leases for its deepening of the Poe well for Sullivan

(e) The finding of Sullivan's condition of financial desperation is repugnant to the careful saving of the opportunity for Sullivan to deepen the Poe well within the term of the lease should Ohio not exercise its option to do so. This guard is placed in each of the writings exhibits A, B and F

VIII There has been no change of plaintiff's theory at any time. The first and only complaint filed in the case remains the complaint. Plaintiff's claims are there set forth. By agreement of Plaintiff and defendant and the District Court one

claim and one claim only was considered by the Court in connection with defendant's contention by its motion that that particular claim was dependent upon the invalidity of the writings and that defendant was estopped by former judgment from litigating their invalidity. A final judgment entered on this question precluded plaintiff from any remaining claim for relief or of opposing the motion on other grounds, and particularly that if plaintiff be estopped by former judgment from litigating the invalidity of the writing plaintiff could never the less recover for the value of the oil from the Poe well and lease. The Poe well and lease remaining the property of plaintiff because the plaintiff did not by the writing transfer the Poe well or lease to defendant but transferred only a right of use, thereof to enable defendant to perform the condition stipulated in exhibit B, to deepen the well, the performance of which condition was necessary to enable Ohio to acquire the Hayden, Williams and Walters oil leases

TABLE OF CASES

Page

Consumers Gas Trust Co. v. Littler, 162 Ind. 320..... 10

Dill v. Fraze, 169 Ind. 53.....

Erie Crawford Oil Co. v. Meeks, 40 Ind. App. 156..... 9

Federal Oil Co. v. Western Oil Co., 121 Fed. (C.C.A. 7th) 7, 12

Federal Oil Co. v. Western Oil Co., 112 Fed. (Dist. Ind.) 7, 11

Gadbury v. Ohio, etc., Gas Co., 162 Ind. 9..... 7

Guffey v. Smith, 237 U. S. 101, 59 L. Ed. 856..... 7

Ohio Oil Co. v. Detamore, 165 Ind. 243.....5, 6, 8

IN THE

Supreme Court of the United States

OCTOBER TERM, 1953

No. 158

JOE W. LOWDERMILK, Receiver of Sullivan Petroleum Corporation,

Petitioner,

v.

THE OHIO OIL CO., A Corp.,

Respondent.

PETITIONER'S REPLY BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

I

There was a genuine issue of material fact with respect to Petitioner's claim to the oil from the Poe lands and summary judgment was improperly entered.

The Court of Appeals, 7th Circuit DID NOT, from a review of all the facts presented by the record, *determine* therefrom *whether or not there was a genuine issue of material fact* in the case.

On the contrary it weighed such facts, and inferences of facts, formed conclusions with reference thereto (disregarding the agreements and facts of record which sustain plaintiff's claim and considering the facts most favorable to defendant), and *determined* issues of material fact. (Errors numbered 2 and 3 of petition, page 7).

The Court of Appeals erroneously decided a question of local law and the precedents which declare that an instrument in writing purporting to grant for only a nominal consideration the exclusive right to mine for and produce and market oil or gas from land to be in "legal effect the grant of or mere use for the purpose of prospecting" in a way conflicting with applicable local decisions. (Errors numbered 4 and 5 of petition, page 7, 8).

It departed from the accepted and usual course of procedure in determining general issues of material fact upon a motion for a summary judgment. (Errors numbered 6 and 7 of petition, page 8, 9).

Its decision and judgment violates the law pertaining to the rule making power of the Supreme Court by denying petitioner the right of trial of the facts by jury as at common law as guaranteed by the Seventh Amendment. (Error No. 7 of petition, page 9).

II

THE THREE WRITINGS HERE INVOLVED

1. **The main contract (Exhibit B) The Hayden, Walters, Williams Lease Assignment**

2. **The rental agreement for use of equipment to drill the Poe well (Exhibit F)**

3. **The agreement for use of the Poe lands and lease for deepening the Poe Well (Exhibit A)**

The contract of the parties is expressed by writings which reflect the formative stages as well as the resulting or formal agreement, exhibit B.

The first of these writings was exhibit "F" which for one dollar gave The Ohio Oil Company an option for the use of the drilling equipment in place for the deepening of the Poe well by resumption of drilling operations by the use of that equipment. This agreement was designed, not only to allow the use of the drilling equipment of Sullivan in place to deepen the well, but also to protect the Poe lease from loss for failure to resume such drilling by June 6, 1942, the day on which the lease by its terms would expire if drilling was not in progress in good faith on that day and continued with due diligence. Exhibit F stipulated that the right of use of the drilling equipment, or option so to do, if not exercised would expire on June 1, 1942. It was also provided that the optionee could not remove the drilling equipment in place without the consent of Sullivan. The conditions of the giving of consent are not set forth. Should the optionee elect not to exercise its option for the use of the drilling equipment the optionor could itself resume drilling and protect the Poe lease from

expiration. Should the optionee elect, it could require the optionor to remove the drilling equipment from the premises, but the general situation and circumstances mentioned compel the belief that by this clause in the option the optionor could require an election on the part of optionee, to deepen the well within the time and in the manner stated. This provision was designed as a means of permitting the deepening of the well by optionee by the use of Sullivan's, its own or other drilling equipment within the period of the option.

The second of these writings was exhibit A which granted an option, or use, of the Poe premises for the purpose of deepening the Poe well. This writing like exhibit F made before exhibit A, provided for the protection of the Poe lease from loss if a well was not drilling on June 6, 1942, by providing that the option should expire on June 1, 1942 unless optionee had commenced the deepening of the well by June 1, 1942. This option was given for $1.

This second writing also provided for the optional use of the optionor's pipe, called casing, in the hole already drilled to a depth of 1700 feet.

AN IMPORTANT variation appears between the first option and the second option. In the first, for the use of drilling equipment, payment was provided to be made for its use should it be used by optionee. The second option for the use of the Poe premises made no provision for payment for the use of the premises. It did provide for return of the pipe used, or its replacement in kind, or its payment, at the choice of the optionee.

The third writing provided for the payment to optionor for the use of the premises in the deepening of the well.

(See exhibit B Record page 42). The payment was the deepening of the well. This writing also stipulated that Ohio was to receive for deepening the well Sullivan's remaining leases, the Hayden, the Williams and the Walters leases.

III

THE COURT ERRED IN DECIDING A QUESTION OF LOCAL LAW CONTRARY TO ESTABLISHED PRECEDENT OF THE HIGHEST COURT OF THE STATE OF INDIANA AND OF THE U. S. DISTRICT COURT, AND OF THE COURT OF APPEALS 7TH CIRCUIT

Indiana Law provides that words of absolute conveyance in oil and gas contracts are but grants of options to explore for the minerals.

The lower courts refused to apply this law in this case.

The local law compels a decision that the parties contracted with respect thereto, particularly respondent, who was a party to its being established. (Ohio Oil Co. vs Detamore, 165 Ind. 243, 248) The local law says that words of absolute grant in such cases do not mean what they say but are controlled by the intent, which in such cases must be to grant an option only to prospect, the real consideration for a grant of oil rights being dependent upon a promise to pay a royalty upon production found which provision for a royalty stipulated a consideration to be supplied upon condition subsequent and which amounted to nothing in the absence of actual production from the leased premises.

The absence of a promise of a royalty upon production makes it impossible for a consideration to be furnished upon a condition subsequent. The grant is therefore limited. The grant is a grant of a use or option only to deepen the Poe well. This is an inescapable rule of local law. This local law was ignored by the decision. This local law, as a matter of fact, expresses the actual intent of the parties in this case.

The local law furnishes a rule of interpretation of oil and gas contracts in Indiana, designed to discover the real intention of the parties and avoid unconscionable results through the employment of doubtful, ambiguous ir consistent and absurd provisions.

Upon experience, the Supreme Court of Indiana made an observation of oil and gas contracts that is well worth taking into consideration here.

> "Whether it proceeds from a design or crafty speculation in oil and gas leases to enshroud their contracts with doubtful, ambiguous, inconsistent and absurd provisions, as a means of promoting their interests, or whether it comes from a custom in rural districts of employing unskilled draftsman, it is a notable fact that few subjects of contract contribute to the Courts an equal portion of contracts for interpretation. The fact is so patent that the courts generally, in gas and oil states, have come to place such contracts in a class of their own, and to look critically into such instruments for the real intention of the parties, because it so frequently happens that they cannot on account of incongruous provisions be enforced according to the strict letter of the contract." Ohio Oil Company v. Detamore, 165 Ind. 243, 248.

Such is the rule of local law for interpretation of oil and gas contracts in Indiana.

These decisions of the highest court of Indiana have been declared rules of property in Indiana to which the Federal Courts will adhere. *Federal Oil Co. v. Western Oil Co.*, 121 Federal (CCA 7th) 674, 675; *Guffey v. Smith*, 237 U. S. 101.

In *Gadbury v. Ohio & Indiana Con. Nat., etc., Gas Co.* (1903), 162 Ind. 9, 10, the lessor did "grant all the oil and gas in and under the leased premises" in consideration of $1 excepting and reserving a 1/6th part of all oil produced, etc., and providing also that "unless" a well be commenced by a given date or $1 per day paid thereafter for each day such completion is delayed.

With regard to the legal effect thereof the Court said:

> "The grant in question, upon its face, appears to be a mere option to the grantee. Every express undertaking upon his part is subsidiary to the exercise of the option to explore and develop the real estate."

And again:

> "The substantial consideration which moves a grantor to execute a grant is the hope of profits or royalties if oil or gas is discovered. Even if the grantee paid the stated consideration of $1—a technical valuable consideration—yet we must construe the instrument with the facts in view that a more substantial reason or reasons prompted the making of the grant." Page 13, citing *Federal Oil Co. v. Western Oil Co.*, 112 Fed. (Dist. Ind.) 373.

> "In grants of the character in question, the title is incohate, and for the purpose of exploration only, until oil or gas is found in quantities warranting operation." (Page 14.)

In *Ohio Oil Company v. Detamore* (1905), 165 Ind. 243, 248, the landowner had, in consideration of $120 in hand paid, conveyed all the oil and gas in and under 242 acres of land together with the right to enter thereon for the purpose of drilling and operating for oil, gas or water. The owner was to have 1/8th of the oil. The lease contained this provision:

> "In case no well is completed within six months from this date, then this grant shall become null and void, unless second party shall pay said first party $120 in advance for each six months thereafter that such completion is delayed."

The action was to quiet title.

The Court said:

> "The mutual understanding and intent of the parties, as to purpose, scope and ultimate object to be attained by the contract, that inspired and accompanied its execution, is controlling, and must be determined, not by detached provisions, but by viewing the instrument as a whole. The contract before us belongs to a rare type. It contains no express covenant to be performed by the company. It contains no promise of the company that it will ever drill a well; no promise that it will renew the term of six months by payment in advance of $120, called rent. The sum total of the company's unconditional agreement is that, if it failed to do one

thing or the other—that is, if it failed for six months to complete a well, or advance $120 for another term—the contract should be at an end. * * *

"In this, as in other contracts of its class, the manifest purpose of the parties was exploration, and the mining of oil and gas. But here, to say the most of it, the grant is incohate, and not absolute. It purports upon its face, to grant all the oil and gas under the land, but in effect provides that, in consideration of $120, the grantee shall have six months in which to decide whether it will accept the grant by entering into possession and beginning the work of exploration. Viewed from end to end the contract amounts to nothing more or less than a six month option, with the right of renewal, based upon a valid consideration, whereby the grantor bound himself not to lease the premises to another, and to give the grantee that length of time to consider and determine whether it would undertake the development of the land upon the terms named."

Similarly, the Indiana Appellate Court in *Erie Crawford Oil Co. v. Meeks* (1907), 40 Ind. App. 156, 161, made the following statement:

"Considering the instrument in question, denominated a lease, as granting, for the consideration of $1, an option for one year to appellant to enter upon, explore, and develop the land for oil and gas, in connection with the migratory habits of the substance granted, impels the belief that a consideration more subsistent than that mentioned induced its execution, and justifies a court in construing the instrument 'with the fact in view that a more substantial reason or reasons prompted the making of

> the grant.' *Gadbury v. Ohio, etc., Gas Co.* (1904), 162 Ind. 9, 62 L. R. A. 895. These reasons appear from the contract to be the benefits and profits from oil or gas to the landowner, in the way of royalties from the oil, or well rental from the gas found, and to the grantee 'anticipated profits in vending the products from the wells it should drill'. *Consumers Gas Trust Co. v. Littler,* 162 Ind. 320."

To the same general effect is the case of *Dill v. Fraze* (1907), 169 Ind. 53, 59, where the court states:

> "This court knows the implied undertaking concerning development was the moving consideration in making the contract."

In the case of *Consumers Gas Trust Co. v. Littler* (1904), 162 Ind. 320, 324, the action was to cancel a lease and quiet title. The lease provided that the lessors in consideration of $1 in hand paid, "sold to the second party all the oil and gas under" certain land (p. 321), it provided a delay rental to be paid of $40 annually until a well was drilled. After the first years delay rental of $40 had been paid, lessor refused to accept further payments of delay rental and brought the action to cancel the lease and quiet title. The Gas Company contended that the $40 paid for the first year was a part consideration for all the rights and property granted, and was not paid in consideration of the option or right to drill for any one year. (P. 324.)

The court stated:

> "The contract before us, like many others of its class, embraces indefinite and peculiar provisions. By it appellee purports to sell for the consideration of $1, all the oil and gas underlying his land. (P.

> 324.) * * * The contract imports a sale of all the oil and gas, to be paid for in kind and by well rental after wells are put down." (P. 327.)

The court held that the $40 paid for an extension of an option to explore, granted in the first instance for $1, and in no way paid, in whole or in part for any other right, that the lessor might refuse to continue the option from year to year by refusal of yearly rental and demand development or surrender of the lease, and, after a reasonable time, obtain a cancellation of the lease and his title quieted.

The opinion of Judge Baker in *Federal Oil Company v. Western Oil Company,* 112 Fed. (Dist. Indiana) 373, cited as authority by the highest court of Indiana in *Gadbury v. Ohio, etc., Gas Co.* (1903), 162 Ind. 913, is particularly instructive, Judge Baker said:

> "There was no binding promissory consideration for the execution of the lease. The only consideration yielded at the time of making the lease was $1 in hand paid. * * * The cash payment, if actually made, was merely nominal. * * * If there was no further consideration a court of equity would be bound to refuse the enforcement of the lease. The consideration would be so trifling, compared to the value of the leasehold interest, as to shock the moral sense. * * * Oil leases stand upon quite different grounds from leases of other immovable property. The governing principle in gas and oil leases of the character in question is that the discovery and production of gas or oil is a condition precedent to the existence or continuance of any vested estate in the demised premises. Where as in this case, the only

> consideration is prospective royalties to arise from exploration and development, failure to promptly explore and develop renders the agreement nudum pactum, and works a forfeiture of the lease, for it is of the essence of such a lease that the work of exploration be commenced and prosecuted with promptness. * * * Oil and gas are of a fugitive and volatile nature, a grant of either of which creates only an incohate right, which will become absolute only upon its reduction to possession. * * * Except to the extent of $1 the lease has yielded no consideration for the lease; nor is it bound by any enforceable promise or covenant. * * * Such a lease is without consideration, and must be held a nudum pactum and void. A lease so unfair, inequitable, and against good conscience no court ought to enforce." (P. 576.)

This Circuit Court of Appeals affirmed Judge Baker's decision by opinion stating other grounds but without criticism of the opinion of Judge Baker, which the Supreme Court of Indiana later recognized as authority in *Gadbury v. Ohio Con., etc., Gas Co.*, as above indicated. In *Federal Oil Co. v. Western Oil Co.*, 121 Fed. (CCA 7th Cir.) 674, 675, this court said:

> "No obligation is assumed by appellant to do anything—either to drill or to pay—it is in fact a mere option."
>
> "Nor does the fact that monthly payments had been made for some months after the contract removed from the agreement the want of mutuality. That payment was not part performance of the contract, but merely the stipulated sum for delay in performance." (P. 677.) (Speaking of monthly delay rentals.)

Exhibit A Was a Valid Option

The failure to develop the lease and to produce the royalty promised upon condition subsequent, leaves the contract a mere option. An absence of such condition subsequent or other promissory consideration, in an instrument, though valid as an option to explore, would be ineffective to confer any rights in the oil.

As said by Justice Baker, "the discovery and production of oil is a condition precedent to the existence or continuance of any vested estate." (Page 40 hereof.) (Proposition 18, p. 35.)

The Court of Appeals discussed certain cases from Indiana, the District Court of Indiana and the Court of Appeals, 7th. Circuit which the plaintiff cited to that court as sustaining plaintiff's interpretation of the local law. These cases appear in the courts opinion page 153 of the record. We have cited the same cases as sustaining our assignment of error Number 1 on page 6 of our petition herein.

We limit our discussion of the opinion of the Court of Appeals in discussing these cases to a request that this Court make an examination thereof to ascertain whether they do in fact establish the law of the forum to be that the instrument the Poe assignment here under discussion must be considered to grant an option or use of the Poe land for the purpose of deepening the Poe well, and granted no rights in the minerals, keeping in mind that it is given upon a nominal consideration of $1, contains no provision by which a consideration may be furnished upon condition subsequent out of the estate purportedly granted in the mineral rights. We sincerely feel that the discussion of

these cases as made by the court of appeals in its opinion is not a fair statement so much being omitted from the quotations made and discussion of the points in issue therein that the summarization made by the Court of Appeals is erroneous.

We feel that these cases when considered with the consideration stipulated to be rendered for the Hayden, Williams and condition of the Hayden assignment, exhibit B, demonstrate also that our belief that this was the actual understanding of the parties is inescapable.

It is very pertinent to note that the respondent remains mute on this phase of the case, as did the Court of Appeals in its opinion. Here respondent confines itself to rules of construction of contracts while the pertinent question is, what is the local law as established by these cases.

IV

OIL AND GAS CONTRACTS ARE CONTROLLED BY SPECIAL RULES APPLICABLE TO THEM BECAUSE OF THEIR PECULIAR NATURE.

The petitioner in his petition to the Court of Appeals for a rehearing emphasized the error the District Court had made in contradiction of ruling precedent which established the law of Indiana to be that an instrument of the kind under consideration is the grant of an option only to explore, and that the words of absolute grant of the mineral rights must be disregarded in favor of a construction compatable with the purpose to be accomplished. Reference was made by petitioner to these Indiana authorities together with decisions of the District Court of The United

States and of the Circuit Court of Appeals which affirm and establish the same rule of construction. All of the mentioned authorities and which are referred to in our petition herein, declare that no interest in the minerals is by such instruments granted where there is no obligation to pay a royalty or other compensation for the minerals independent of, and in addition to the consideration for the option or grant of the right of use. All of these authorities hold $1 to be sufficient consideration for the option or use for prospecting and further that the promise of a royalty upon minerals discovered by such prospecting is a condition subsequent which ordinarily supplies the consideration for the grant of mineral rights which grant amounted to nothing prior to their discovery. All of these authorities are in accord with the principle that such a grant in absolute form transfers a right of use only, or an option, to prospect and no right in the minerals in the absence of a consideration to be rendered upon condition subsequent, where there is no present consideration other than the nominal one paid for the option to prospect.

In the presentation of this error as above stated petitioner referred to the instrument in controversy and to the incongruity of the sentence containing the supposed grant of the mineral rights in the Poe well with the following sentence. Petitioner pointed out to the Court that this sentence in and of itself, and without regard to the rule of property in Indiana, demonstrated the fact to be that the purpose and intent was to make a grant of a mere use or option. In that connection petitioner said, as he would have said had it been a deed of conveyance absolute upon its face but given to secure a debt, that the words of grant did not mean what they said, but meant only to

grant an option or right of use of the premises for prospecting. This sentence is in the following words,

> "Assignor does hereby sell, transfer, assign and set over to Assignee that certain test well for oil and gas now located on the premises above described and known as Sullivan Petroleum Corporation's A. Poe No. 1, together with the casing now in said well"

and the following sentence which reads,

> "Assignee agrees that in the event the drilling operations hereinafter referred to result in the completion of said well as a dry hole, then in that event, Assignee will pull from said well all casing therein which can be pulled through ordinary methods and will deliver to assignor on the premises above described such casing as can be pulled."

This quotation is from the record herein beginning at top of page 13. It is immediately followed by a further provision that instead of returning the casing pipe Assignee might replace it in kind or pay assignee its market value.

Our statement that this sentence did not mean what it said is by clever word made the butt of ridicule. See respondents brief pages 9, 16.

We feel it quite clear in demonstrating that no sale or transfer of title of the casing pipe was intended, nor of the well itself for $1 by this sentence. It provided for the *use* of the casing pipe and the *use* of the well.

The case of Ohio Oil Co. vs. Detamore 165 Ind. 243, is instructive on the question of the local law of interpretation of oil and gas contracts.

V

THE HAYDEN, WILLIAMS, WALTERS ASSIGNMENT CLEARLY EXPRESSES THE AGREEMENT, ITS OBJECTS AND CONSIDERATION, WHICH WAS THE DEEPENING OF THE POE WELL.

The Court of Appeals found the contract to be a transfer by plaintiff to defendant of all rights in all of the leases in consideration of the defendant paying a small overriding royalty upon certain of those leases enumerated by exhibit B, referred to as the Hayden assignment. This finding was contrary to fact, or as the fact might be found by a trier or tryers of fact. Exhibit B stated the consideration to be otherwise. Exhibit B stated the consideration to be the deepening of the Poe well. The statement of this consideration was couched in such language as a condition precedent as to make it a tacit declaration of objective. It is a statement of purpose and consideration, in form a condition precedent to the defendant acquiring any rights.

That this was the present consideration is shown by the fact that it is the only thing required of defendant to be done. On the performance of this condition defendant's title became vested in the Hayden, Walters and Williams leases. The Poe lease was excluded from the enumeration of leases to belong to defendant upon the performance of this condition. If intended to belong to Ohio why was it not included. Simply because Ohio was to deepen the well for the Hayden, Williams and Walters leases. The return of this consideration to Ohio was no where stipulated to be made. One does not receive payment for one's conveyance and then return the payment. The deepening of the Poe was to pay for the Hayden, Walters and Williams

leases. The performance of the condition could furnish no payment for the Hayden, Walters and Williams leases if the Poe lease is also to be given to defendant for performing the condition.

No other payment was provided to be made for the leases. The small overriding royalty upon the Hayden, Walters and Williams leases could not be considered a consideration for the transaction. There was no promise to make this overriding royalty available. The development of the Hayden, Williams and Walters leases was not required. The performance by defendant's development of the Hayden and not the Walters or Williams is the defendant's construction that it had no duty or obligation to make the overriding royalty available from the Walters and Williams leases which it did not ever drill.

The Hayden, Williams and Walters leaseholds, burdened with a charge of an overriding royalty if and when oil be produced therefrom but without obligation to produce oil therefrom, were to become the property of the defendant when the defendant deepened the Poe well of Sullivan Petroleum Corporation as specified.

It cannot be said that the burden of the overriding royalty by which the estates transferred were lessened could be the present or the chief consideration for their transfer in view of the plain language used. The entire estate was not given but the estate diminished by the overriding royalty was given for the deepening of the Poe well.

To the leases enumerated in exhibit B and which that instrument stipulated were to become the property of Ohio upon the deepening of the well, the court added the Poe lease. No plea was made for reformation of exhibit B, and

no reformation justified either in fact or in law—certainly not upon motion for summary judgment.

VI

THE DECISION OF THE LOWER COURTS ERRONEOUSLY MADE A NEW CONTRACT WITHOUT A PRESENT OR PROMISSORY CONSIDERATION, IN PLACE OF THE CONTRACT MADE UPON A PRESENT CONSIDERAION STATED IN EXHIBIT B FOR THE HAYDEN , WILLIAMS, WALTERS LEASE ASSIGNMENT.

The decision sets out definite and specific facts, specifically set out and separately stated which are contradictory of and repugnant to other known and indisputable facts, which other known and indisputable facts establish a different purpose and different consideration than the facts as recited in the decision. These indisputable facts establish the purpose to be the deepening of the Poe well in contrast with the finding of an understanding that the purpose was the transfer of all of Sullivan's property to Ohio in a hope of a royalty that might in some way, by chance become a reality; this chance royalty was held to be the consideration in contrast to the consideration of deepening the Poe well.

Of the three writings stated in the decision to form the contract, the first provides for the use of Sullivan's drilling equipment to deepen the well; the second provides for the use of the well and lease to deepen the well; the third provides for the deepening of the well to pay for the Hayden, Williams and Walters leases by it transferred to Ohio.

Not-with-standing the decision and opinion that exhibit F, set out in the appendix hereto was consistent only with an understanding that the Poe well upon its completion was to belong to Ohio it is an utter impossibility to find any support for such an understanding in that writing. Certainly men of common or ordinary understanding might find none upon a trial.

The evidence of "condition" of Sullivan was furnished by an unverified answer which improperly influenced the Court into believing Sullivan to be in a state of financial desperation and acting in desperation, which induced it to grasp at anything. The Court believing Sullivan not to be in position to ask payment for its properties, but must necessarily take anything, however doubtful of realization, made a transfer of all its properties to Ohio in the hope that Ohio might some day drill upon the Hayden or Williams or Walters lease for oil and find it there. The condition to the transfer that Ohio must deepen the Poe well in order to be eligible to accept the gifts really meant nothing to the Court. Anyway Ohio did deepen the well and no question is raised on that score. It is a notable fact that no one swore to this state of desperation.

Reasonable persons of ordinary intelligence may attach much importance to this condition precedent in exhibit B. It may reasonably be determined that this condition expressed the agreement. It should not be written off by speculation or conjecture. It should not be nullified by inference upon inference. Nor should it be ignored simply because it cannot be reconciled to an understanding that it was intended that defendant be granted the oil rights in the Poe lease.

The Court of Appeals constructed a contract from supposed fact. The Court of Appeals did not interpret a contract but it constructed one, not from law, but out of fact it chose to consider as fact. Upon a trial of facts this would be proper. Upon a motion without a hearing of fact it denies the plaintiff a trial upon the facts. Plaintiff was entitled to a trial of the facts to determine whether the facts were as stated by the court or as stated by the plaintiff herein.

The contract was constructed from facts found by the court. It is not a case of an interpretation of a contract from undisputed fact. It might be argued to be the construction of a contract out of conflicting fact, but that is the very thing we complain of having been done without a trial of fact. Plaintiff was entitled to his day in court. Plaintiff has been denied any trial at all.

The consideration which supports a contract has generally been held to be a question of fact. It has always been permissible to dispute the consideration recited by showing it to be greater or less, or to be different than that expressed, or to be without consideration. There was no statement by affidavit that the consideration for deepening the Poe well was the transfer to Ohio of the Poe lease as well as the Hayden, Williams and Walters leases; nor was there any such statement anywhere, in the complaint, or affidavits that it was the understanding that the Poe well or Poe lease was to become the property of Ohio upon completing the well by deepening, nor was there anywhere in the record anything from which it could be believed that there was such an understanding. Yet it has been determined as a fact that the consideration for the agree-

ment to deepen the Poe well was the Hayden, Williams and Walters leases and the Poe well and Poe lease in contradiction of the expressed consideration stipulated by exhibit B.

This has all been done in spite of the fact that this question of consideration was not offered or advanced as a cause for the summary judgment and plaintiff had no opportunity by affidavit, deposition or otherwise to oppose the motion on the ground that the consideration was different than that expressed in the contract, or that the contract need be reformed.

The court wrongfully inserted in exhibit B the name and description of the Poe lease to be added to the properties enumerated to become Ohio's property for deepening of the Poe well.

VII

THE LOWER COURT IN WEIGHING THE FACTS ON A MOTION FOR SUMMARY JUDGMENT:

(A) **Ignored the condition stipulated in Exhibit B, that Poe well was to be deepened in return for the Hayden, Williams and Walters lease**

(B) **Substituted a speculative understanding that Poe well upon deepening was to vest in Ohio, and**

(C) **Found that Sullivan was financially prostrate thus declaring a new contract between the parties contrary to the actual contract.**

The questions raised by each of the eight assignments of error are of great general importance.

Can a judge deny a right of trial by jury upon genuine issues of material fact by a decision that there are no genuine issues of material fact when the fact is otherwise?

May a judge summarily dispose of plaintiff's claim by a summation of facts and surrounding circumstances which the judge selects from the record without a trial as creditable evidence in contradiction of and in disregard of other evidentuary facts and circumstances that would lead another reasonable intelligent person to arrive at a different belief?

In legal phraseology does the summary disposition of plaintiff's claim by a judge without a trial based upon facts selected from the pleadings and affidavits in disregard of other facts appearing in such pleadings and affidavits, that would lead a reasonably intelligent person to arrive at a different belief and judgment, violate the provisions of the Seventh Amendment or of the Act of Congress delegating power to this Court to enact rules of civil procedure upon condition that a trial by jury as guaranteed by the Seventh Amendment would be preserved?

Where there is before the reviewing court the same documentary evidence as was submitted to the lower court and from which the lower court predicated its decision upon stated facts, the reviewing court is in as good a position to make a determination of the facts as the lower court. The reviewing court is not, in such cases, concluded or foreclosed by the decision of the lower court from a consideration of all the facts, nor by a decision that there is no genuine issue of material fact.

If, in a summary proceeding such as here sought to have reviewed, the reviewing court is foreclosed by a decision

of the lower court either that there is no genuine issue of material fact, or, that the facts are as stated by the lower court, then and in that case the lower court is so possessed of despotic power that it may, without fear of review, determine the merits of any claim without a trial.

The defendant's claim to the oil in this case is predicated upon writings upon which the defendant is dependent. These writings set forth the objective of the parties together with a succinct and clear statement of the consideration to be rendered the plaintiff for its properties. This solemn declaration of purpose and upon the rendering of the consideration stipulated, all rights of the defendant were dependent, received no consideration by the court below. It was but casually mentioned in the court resume of what the writings contained; no further mention of it was made. This solemn stipulation was excluded from a consideration of the facts upon which the court made its decision. In the place of fact appearing in and from this writing the court injected facts upon conjecture and speculation.

VIII

THERE HAS BEEN NO CHANGE IN THE PLAINTIFF'S "THEORY" AS STATED IN HIS COMPLAINT.

There was an agreement between Plaintiff's and Defendant's counsel and the District Court (See Appendix hereto p. 38), that the only matter presented under the motion for Summary judgment was estoppel by former judgment from litigating the validity of the writings.

It has, in substance, been stated that the Rules of Procedure contemplated that a claim asserted by complaint

would not be summarily disposed of by a final judgment without a trial unless it conclusively appeared that the plaintiff was not entitled to relief upon any possible theory. A suggestion that plaintiff cannot sustain its claim upon the facts stated in its complaint from the very beginning is without merit. What the defendant really complains of is that the plaintiff insists upon sustaining its claim upon a theory different than the theory the defendant has chosen upon which to litigate the plaintiff's rights. The defendant's chosen battleground is expressed in its motion that the plaintiff must recover upon the premise of the invalidity of the writings. The plaintiff has chosen the ground that though the defendant's plea of estoppel by former judgment forecloses plaintiff from recovering upon the theory of the invalidity of a writing, herein referred to as exhibit B, the plaintiff may still recover; in other words plaintiff's recovery in conversion is by such plea limited, to a recovery for oil or oil rights, not by such contract granted defendant. In short it is plaintiff's theory that defendant was not by contract granted the right to produce or market the oil from the Poe lands; that defendant took the oil from such lands without right, which was the sole property of the plaintiff.

Defendant was by writing exhibit A, granted a right of use only of the Poe lands for the purpose of deepening a well thereon of the plaintiff; and, of course, to perform the condition precedent to defendant's becoming possessed of the right to take the oil from the lands described in exhibit B, the Hayden, Williams and Walters lands.

The caution with which the summary disposition of a claim without trial must be approached is further emphasized by the fact that the judgment entered cannot be

reviewed before the lower court upon motion as after a trial, no provision is made by rule for a rehearing as in case of a new trial. It is the duty of the court to carefully search the record to ascertain whether or not plantiff's claim can be sustained in whole or in part upon any possible theory. It is its duty to permit amendments where the facts disclose a claim even though that claim be not fully covered by the complaint. It is to be presumed in this case that the lower court did its duty. It is not to be presumed, as inferred by defendant from its declaration that plaintiff made no move before the lower court to get the judgment corrected for error in the court's judgment of which the plaintiff on appeal complains, and now complains. The plaintiff's sole and only remedy was by appeal. The inference that the lower court did not comprehend and through lack of understanding of the issues entered an erroneous judgment which it would have corrected upon application must be rejected. Plaintiff cannot be foreclosed from a review of the judgment for failure to obtain a correction of error by methods unauthorized, at least not authorized by the Rules of Federal Civil Procedure. The judgment entered was final. After its entry plaintiff was not in court, plaintiff had no standing thereafter before the lower court. The right of appeal only was left.

The respondent attacks our petition from the point of view that we have changed our theory of recovery. Nothing could be farther from the truth. Our complaint is the same original complaint as filed in the State court. It definitely sets forth our ownership of the exclusive right to produce the oil from the Poe lands under our lease. It is averred that nothing was ever paid or promised by defendant to Sullivan for those rights and that nothing has ever been re-

ceived therefor. The writings, exhibits A and B, were attached thereto as exhibits from which it definitely appears that defendant was not granted those rights and had no right to the oil from the Poe lands.

Defendant filed its special motion attacking the claim upon the ground that plaintiff must recover upon the theory of the invalidity of those two exhibits. The motion was not directed to the insufficiency of a claim for relief upon the theory that notwithstanding their validity plaintiff was entitled to relief for the conversion of the oil from the Poe lands because that right was neither purchased or granted to the defendant by the writings or paid for.

After the motion was filed a conference was had by the parties with the District Court as to the manner of disposing of the motion. It was agreed between plaintiff and defendant, and before and with the District Court, that one question, and one question only, would be determined in the first instance, and the remaining questions arising as a result of the motion would be left for later hearing and determination. The question so selected for determination was whether or not plaintiff was estopped by former judgment from litigating the validity of exhibits A and B. This was the only question heard or argued orally before the District Court. The Court without previous advice to the parties and without expression of opinion thereafter entered the summary judgment appealed from.

The respondent in support of this attack upon our petition goes beyond the record and there is nothing in the record either to affirm or disprove respondent's claim as stated on page 14 of its brief before this Court and elsewhere stated therein that "Petitioner's claim of surprise

at this is itself astonishing'' and etc. The attack so made, and the manner of its making is like offering improper evidence, which having been heard cannot be washed from the mind by an instruction to do so from the Court. For fear of a similar result here we have printed in our appendix hereto beginning at page 38 a copy of a letter from respondent to plaintiff which explains the fact as it actually is. The original is filed with our original of this our reply brief. We vouch for its authenticity in every respect.

IX

RESPONDENT DOES NOT MEET PETITIONERS SEVEN ASSIGNMENTS OF ERROR.

Petitioner set forth eight specific reasons for its petition for a writ of certiorari giving an opportunity for each to be dealt with separately and separately shown to be without merit. Respondent studiously avoided their separate consideration.

Respondent acknowledges that petitioner designated in its petition 8 specific errors committed below. See respondent's brief page 9. However respondent did not take up these errors in the order assigned or in any order, nor does it discuss any particular error by itself. Only by creating confusion by a shot gun discussion all jumbled together could it find hope in sustaining the judgment. We acknowledge respondent's effort to result in a very skillful mixing of which a casual reading places petitioner in the category of a disgruntled litigant, floundering around for some cause of complaint. And, respondent winds its response to the petition around a false assertion that petitioner changed

his theory of recovery on appeal. Respondent cites no page of the record to support this charge and of course there is nothing in the record to support it. It is 100% false statement as shown by a writing set out in the appendix hereto. Respondent, however, intertwines it with its whole argument, alluding to it here and there, but always pressing it foremost. Respondent also makes much talk about plaintiff declaring in his petition for a rehearing before the Court of Appeals that a certain sentence in exhibit A did not mean what it said and uses it as a butt of ridiculing petitioner's request of protection by this court of his rights under the law and under the Constitution.

It is our purpose in this our reply to respondent's brief to eliminate much of the work and study that would otherwise fall upon the court in unraveling the confusion and uncertainty introduced in these proceedings by respondent's failure to forthrightly and frankly discuss the reasons given by petitioner to this Court for his belief that he has been denied his rights under the laws and the Constitution.

Petitioner presented eight questions by his petition (Pet. p. 3) following which these eight questions were embodied into eight reasons for allowance of a writ of certiorari (Pet. p. 4), which were followed by assignment of eight errors made by the Court below (Pet. p. 6) (Errors 7 and 8 being included under the 7th assignment of error).

1. Respondent has declined to discuss error assigned number (1) page 6 of petition, stating merely that the Court of Appeals has said all that need be said on that question. We can well understand the taking of this position, no more skillful avoidance of stating the law as determined by the cases cited could be made. These cases do

in fact establish the local law to be that an instrument in writing purporting to grant for only a nominal consideration the exclusive right to mine for and produce and market oil or gas from land described to be in "legal effect ... grant of a mere use for the purpose of prospecting" quotation from *Federal Oil Co.* v. *Western Oil Co.*, 12 (CCA 7th) 674 at page 676.

2. Respondent declines to discuss error numb of the petition that the Court erred in determining issues of material fact further than by a general

3. Respondent declines to discuss error numb page 7 of petition, which assignment of error goes very meat of the whole controversy. It was passed the Court of Appeals, the mere mention of which have caused a disintegration of the Court's findin understanding that the Poe well was to belong to Ohio is certain that the object of the making of exhibit Poe option agreement, as well as the true and on sideration for the transfer to Ohio of Sullivan's ing oil leases, is tacitly and clearly expressed in the ment of the Hayden, Williams and Walters leases nated herein as exhibit B. The purpose and consid is found in the condition made to the ownership o three named leases becoming the property of Oh Poe lease is not included in the leases designated to Ohio's property upon the deepening of the Poe Ohio. See page 42 of the record. A discussion of this would have clearly demonstrated that the Court below announcing that the understanding was that the Poe was to belong to Ohio announced a fact that directly opposition to and contradictory of exhibit B. It was not therefore mentioned by respondent.

POOR COP

4. Error assigned numbered (4) petition page 4, 5, that the Court could not in fact, but nevertheless did, find as a fact that petitioner construed the Poe assignment by his failure in certain court proceedings to recover of Ohio ent for the casing pipe in the Poe well to make an issue litigate the question of ownership of the Poe lease. ndent's failure to support the Court's decision was twofold, first it was so far fetched that no amount ent would sustain the finding, second, a discussion sult in a demonstration that the Court did in fact finding of fact in that particular, which other rea- intelligent men would not find to be a fact.

espondent failed to discuss error numbered (5) of ion page 8, which went to the very heart of the opinion. Without a declaration by the Court that was an understanding that the rights covered by assignment were, upon performance, to be vested there would be no basis at all for the Court's and judgment. Notwithstanding the attack made his recitation of fact by the Court that this fact t possibly be true, much less come from the source by the Court, namely exhibit F, but remains mute. fact so stated is a fact in the case to be considered direct conflict with the clause in exhibit B which the object to be accomplished and the consideration Hayden, Williams and Walters leases to be the ac- ishment of that object, namely the deepening of the well. The respondent remains mute. It is not to be ned that so well founded an attack upon the opinion decision of the court went unnoticed. Respondents were unable, and we submit that no one is able, to point to anything (in exhibit F) from which any person can truth-

COPY

fully say would lead triers of fact to believe that there was an understanding that the Poe lease was to become the property of Ohio upon the deepening of the well. Exhibit F, printed in the appendix hereto, certainly cannot be said to establish such a brief, as stated by the lower Court.

6. Error assigned numbered 6 petition page 8 charges that the Court below erred in adopting the allegations of the unverified answer appearing at page 29 folio 69 of the record as proof of and as setting forth the surrounding circumstances and financial condition of Sullivan and with which it was "at the time engulfed" which caused Sullivan to make such an improvement contract as the one constructed by the court from a consideration of those surrounding circumstances recited by the court from defendant's unverified answer without any proof of them. The respondent has nothing to say in defense of the decision which it wants upheld, and which must be set aside for the reason so assigned. There can be no doubt but that the Court's decision was dependent upon this belief of distress which in the Court's belief motivated Sullivan to follow the saying that "to he who hath shall be given," etc.

7. The seventh error assigned by the petition at page 9 thereof is likewise not mentioned by respondent. It is that the case has been decided in such a manner as to call for an exercise of the power of supervision of the Supreme Court. That while it declares there to be no fact in issue it repeatedly determines questions of fact in a way that are in conflict with opposing undisputed fact. That a discussion of the conflicting fact is sought to be prohibited by a declaration that there are no facts in dispute. Such a declaration after a trial of fact would preclude a consideration of opposing fact upon appeal being considered a rejection

of opposing fact. On this appeal, however, error assigned is the sorting out of fact from conflicting facts, if there is to be any sorting, and there most assuredly should be if the Court's version of an "understanding" is tenable, it must be done by and at a trial of fact and not upon motion for summary judgment.

8. The eighth error which appears on page 9 of the petition as a part of number 7 for lack of a number charges that the action of the Court denies the plaintiff to a right of trial by jury in violation of the 7th Amendment and in violation also of the injunction of Congress that the Rules of the Supreme Court adopted by authority of an Act of Congress must preserve the right of trial by jury. Petitioner has been denied that right.

The petitioner pointed out in his assignment of errors certain definitely stated and identified facts recited by the Court in its opinion as facts. These stated and identified facts petitioner claimed by errors assigned numbered 3, 4, 5, and 6 to have been unwarranted conclusions of fact that might not have been drawn by men of reasonable intelligence given the duty to determine the facts.

It was further charged that these stated and identified facts were in conflict with other indisputable facts appearing of record. To these charges defendant makes no response.

Errors assigned charged that the finding by the Court of an "understanding that the rights covered by the Poe assignment were, upon performance, to be vested in Ohio," was in conflict with and opposed to an indisputable fact, stated in exhibit B, that the Poe well was to be deepened in the time and manner stated in consideration of the

transfer to Ohio of the Hayden, Walters and Williams leases. To these charges respondent has not responded.

Obviously respondent has found it impossible to support by explanation the decision complained of by the petitioner. All respondent has been able to do is to make it appear by confusion that it has discussed these errors. The most that respondent has said of the decision is that the Court of Appeals correctly decided the law and made no finding of fact. Respondent does not support the decision so far as to say that the facts stated by the Court in its opinion upon which the decision was made are uncontradicted by other fact.

By dealing in generalities respondent avoids making response to any particular reason given by petitioner for a writ of certiorari, increases the burden of the Court and makes necessary the filing of this reply brief by petitioner.

X

CONCLUSION

It is not new for respondent to claim ownership of the mineral rights under doubtful or ambiguous writings. Ohio made that claim in *Ohio Oil Co.* v. *Detamor*, 165 Ind. 243, and drew forth the rules of interpretation of oil and gas contracts in Indiana. This pretext of ownership is insupportable in law, by fact or in conscience.

Respondent points out that no fraud is charged by the petitioner's complaint. The fraud consists in asserting a claim to the Poe well, to more than respondent is entitled to receive by the contract actually made. Respondent has

gained through the intermediary of our courts a substitution of a new contract by which the respondent pays nothing for petitioner's Poe well or Poe lease. Under the contract made by the parties the Poe well was to be deepened for Sullivan's pay for its Hayden, Williams and Walters leases. Under the agreement of the parties each should have received a million dollars, whereas under the contract made by the courts respondent takes all.

We renew our assertion in our petition that the Court below erred in such a manner and way as to call for a review of its action, not only in the interests of securing to plaintiff its constitutional right of a trial by jury, but in the common interest.

(a) Error was committed as charged in deciding the case contrary to local law.

(b) Error was committed in construction and application of the Rules of Federal Civil Procedure, 1, in treatment of defendant's motion as one for summary judgment as distinguished from one for partial summary judgment. This treatment of the motion is important and of general interest in that it permitted a disposition of the entire case, thus trapping the plaintiff in not contesting the motion generally but only specially upon the particular and specific grounds assigned by the motion. Upon motion to dismiss for insufficiency plaintiff has a right to amend. May the motion to dismiss for insufficiency be so supplanted by a motion designed to cut off the right to amend, and is that the purpose of the allowance of a motion for summary judgment?

(c) Error was committed in denying a trial of genuine issues of material fact.

The framers of our constitution recognized, and we recognize at this moment by our constitution that we are not all possessed of the refinements of great learning but that our Creator endowed the great majority of us with a common understanding for our guidance which seldom leads us astray. It is the hands of these people of common understanding that has been delegated the power of determination of our disputes. The preservation of this right was the only restriction placed by the Congress upon rule making power of this court.

Sufficient facts appear in the opinion of the Court of Appeals that it may well be cited as authority for a Judge to determine in advance of a trial, and without trial, the terms of a contract from its divergent, doubtful or conflicting provisions, and further, that a judge in making such determination may properly under Rule 56 of the Rules of Federal Civil Procedure, determine the ultimate fact, object, purpose of accomplishment and consideration from the conflicting provisions of the contract aided by a consideration of the Judge's determination of the surrounding conditions and circumstances of the parties from affidavits, and etc. (We do not mention unverified pleadings because it does not appear from the opinion itself that the court's determination of the "condition" of Sullivan was arrived at from the unverified answer.) And further that the judge may make a determination of the consideration to be different than that expressed in the writing, and upon that determination render a decision which forms a different contract than that which is formed by the consideration ex-

pressed in writing itself, and that his determination of what the consideration was is not reviewable as the decision of a jury would be were the same question of fact submitted to a jury for determination.

Exhibit B is consistent only with an agreement that the deepening of the Poe well was to provide payment by Ohio to Sullivan for the Hayden, Williams and Walters oil leases. Such payment could be made only from the oil obtainable by its deepening. Sullivan had no other property to be benefited; there was no promise or undertaking by Ohio of any kind that would offer Sullivan anything for the Poe well or Poe lease.

Exhibit B, the last and final writing made, modified any provision or term of the two preliminary writings exhibits F and A that might, or might seem to conflict with any part of exhibit B. All previous writings were merged in exhibit B, the last and only contract.

We respectfully submit that the petition for writ of certiorari should be granted in the common interest and to secure to petitioner justice under law.

GARRETT W. OLDS,
JOHN W. BECKER,
CLARENCE R. MARTIN.

Attorneys for Petitioner

Office and Post Office Address
404 Indiana Trust Building
Indianapolis, Indiana

September 30, 1953

BARNES, HICKAM, PANTZER & BOYD

Earl B. Barnes
Hubert Hickam
Kurt F. Pantzer
Allan W. Boyd
Charles M. Wells
John H. Groves
Thomas M. Scanlon
Frederic D. Anderson
Lester Irons
Jerry P. Belknap
Robert S. Ashby
Louis A. Highmark
John W. Houghton
George J. Zazas

Attorneys At Law

Indianapolis 4, Indiana

1313 Merchants Bank Bldg.
Telephone Atlantic 1313
Cable Address "Lexopoli"

November 27, 1951

Mr. John W. Becker
369 Massachusetts Ave.
Indianapolis 4, Indiana

Re: Joe W. Lowdermilk, Receiver of Sullivan Petroleum Corporation v. The Ohio Oil Company

Dear John:

I think you will agree with me that it would have been proper if we had asked the court to make an order specifically outlining the limited issue of the motion for summary judgment which is now being submitted to him. Perhaps we should have such an order at the time of the argument.

In order to make sure that there is no misunderstanding between you and me as to the scope of the issues now being presented, I read to you Yesterday over the telephone a statement of the three issues covered by the motion for a summary judgment as we propose to put it into our reply brief with a statement that number 1 is the only one now

being submitted to the Court. Our statement so read to you is as follows:

1. As a result of successfully asserting the validity of the Poe and Hayden assignments in two prior actions resulting in judgments legally enforcing the provisions of such assignments against this defendant, the plaintiff is now estopped to assert the invalidity of either of such assignments.

2. The assignments of the oil and gas leases described in plaintiff's complaint did not require approval of the stockholders of Sullivan Petroleum Corporation.

3. The assignments of the oil and gas leases were supported by sufficient consideration.

We are agreed that number 1 only is being submitted to the Court at this time with the reservation for further submission, if necessary, of numbers 2 and 3.

Very truly yours

Hubert Hickam

HH/no
cc: Mr. John W. Becker
Allisonville Road
Carmel, Indiana

Mr. Clarence R. Martin
404 Indiana Trust Building
Indianapolis 4, Indiana

EXHIBIT "F", Record page 59

Rental Contract.

This Agreement, Made and entered into this 25th day of April, 1942, by and between Sullivan Petroleum Corporation, an Indiana corporation, as First Party, and The Ohio Oil Company, an Ohio corporation, as Second Party, witnesseth:

1. First Party, for and in consideration of the sum of One Dollar ($1.00), cash in hand paid, receipt of which is hereby acknowledged, agrees that it will rent to Second Party that certain Starr drilling machine and the tools and apparatus used in connection therewith now situated on that certain leasehold estate known as the A. Poe lease and being the northeast quarter (NE¼) of the southwest quarter (SW¼) of section three (3), town eight (8) North, range ten (10) west, Sullivan County, Indiana.

2. This agrement shall remain in force for a period of one hundred eighty days (180) from its date unless sooner terminated as hereinafter provided.

3. Second Party agrees that it will pay the First Party the sum of three dollars ($3.00) per day for each day in which said drilling machine and apparatus are actually used in drilling operations by Second Party. In the event Second Party operates said drilling machine and apparatus for more than eight (8) hours but not more than sixteen (16) hours in any one day, Second Party will pay to first Party as rental the sum of six dollars ($6.00) for each day in which said drilling machine is so used, and in the event said Second Party operates said drilling machine for more

than sixteen (16) hours in any one day, Second Party will pay First Party nine dollars ($9.00) for each day in which said machine and apparatus is so used. Rental payments hereunder shall be made by Second Party by the tenth (10th.) day of each calendar month for all rent accruing in the next preceding calendar month.

4. Second Party agrees to make all repairs and replacements in said drilling machinery, tools and apparatus at its own cost and expense and Second Party agrees that upon termination of this agreement it will return said drilling machinery, tools, and apparatus to First Party in as good as that in which they were received by Second Party, ordinary wear and tear and action of the elements excepted. Second Party agrees that it will not remove said machinery, tools, and apparatus from the premises above described without the written consent of the First Party.

5. Second Party may at any time terminate this agreement by giving written notice to First Party of its election so to do and by payment of the sum of one dollar ($1.00) to First Party. First Party agrees that upon termination of this agreement it will promptly remove said drilling machinery, tools and apparatus from the leasehold estate above described, and Second Party shall thereupon be relieved of all obligations under this agreement.

In Witness whereof, First Party executes this agreement through Roy Myers, its Secretary, and Second Party executes this agreement through C. C. Carroll, its Manager, this 25th. day of April, 1942.

Sullivan Petroleum Corporation
By Roy Myers, Secretary

The Ohio Oil Company
By C. C. Carroll

Approved:
F. H. Pannill, Attorney